Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

LEONARD HIATT, *et al.*,

Petitioners,

vs.

UNION PACIFIC RAILROAD COMPANY, a Utah Corporation; UNITED TRANSPORTATION UNION,

Respondents.

JEROME SMITH, *et al.*,

Petitioners,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware Corporation; UNITED TRANSPORTATION UNION,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the seniority system utilized was bona fide under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, when the evidence presented demonstrated that the system was changed in a manner known to result in disproportional disadvantage brakemen within the age protected group.

2. Whether the district court, in a decision affirmed by the appellate court, erred in converting Defendants' motions to dismiss into summary judgment motions without notice and while all discovery was stayed at Defendants' request.

3. Whether the district court, in a decision affirmed by the appellate court, erred in holding that Plaintiffs failed to establish that Defendants' reasons for its actions were pretextual in their "disparate treatment" claim.

4. Whether the district court erred, in a decision affirmed by the appellate court, in holding that the "disparate impact" doctrine is inapplicable to cases brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*

LIST OF PARTIES

The Petitioners in the proceedings below were Plaintiffs-Appellants at Docket No. 94-8088. They are as follows:

LEONARD K. HIATT; ROBERT A. BAGBY; MARVIN CRABAUGH; GARY W. BOATRIGHT; RONALD L. ROBERSON; CARL D. HOUK; JERROLD B. HUTCHINGS; DUANE K. HINKLE; LARRY L. BURBACK; STEPHEN J. MILLER; KIM R. HARDMAN; KENNETH R. COVINGTON; MICHAEL E. VALENTINE; GARY L. YANKEN; PATRICK M. HERRLEY; MIKE I. CARLSON; RANDALL O. SWARTHOUT; SAMMY L. CROSS; DARRELL D. MILLER; RONALD L. STODDARD; JAMES D. TOLLE; LARRY S. CLARK; ROBERT T. EPLER; RICHARD W. CAVENDER; DALE YOUNG; ROBERT F. MCINTOSH; JULIAN R. NELSON; WALTER T. GRONEK; RONALD E. OSTENDORF; RONALD R. JOHNSON; MELVIN E. SAYRE; ROBERT F. LANNON; GERALD T. DUELING; PHILIP J. EBERHARDT; ROXIE L. JACKSON; RUSSELL P. EGGERS; RON G. VAN NORTHWICK; THOMAS M. MCMURTRY; LARRY R. MANN; MAURICE F. MCDONALD; DONALD A. RASCHKE; CLEO D. SCHROEDER; KENNETH W. MCINTOSH; ROBERT A. PODJENSKI; GILBERT R. THROM; DONALD K. PETERS; ROBERT G. WENZEL; CECIL B. MILLER; LEROY W. ROTH; JAMES L. WELLS; CHARLES F. SMARTT; JAMES W. JENKINS; JOHN J. STAMATE; GERRY W. SPINDEN; DAVID E. DUPREE; DONALD R. SMITH; JAMES P. MANARY; RONALD B. HUNT; ROBERT E. WILLIAMS; DENNIS J. SMITH; GARY E. METCALF; BENNY L. COVINGTON; ROBERT E. WEDGWOOD; NORMAN R. THOMAS; JON L. STONE; STEVEN L. BROWN; JOHN R. HOLLOWAY; WARREN H. BUSH; EDWARD W. BERARDINO.

The Respondents in the proceedings below were Defendants-Appellees at Docket No. 94-8088. They are as follows:

UNION PACIFIC RAILROAD COMPANY, a Utah corporation; UNITED TRANSPORTATION UNION.

Appearing as Amici Curiae at Docket No. 94-8088 were as follows:

THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; EQUAL EMPLOYMENT ADVISORY COUNCIL.

The Petitioners in the proceedings below were Plaintiffs-Appellants at Docket No. 94-8089. They are as follows:

JEROME J. SMITH; MICHAEL R. RAMOLD; MICHAEL X. KOSMICKI; RICHARD J. MCCUNE; DANIEL L. EASTMAN; DONALD E. LOOKER; ROBERT A. HARGER; STEVEN L. BURBACH; DONALD S. SEGHI; ROLAND G. BEARD; EARL J. VANCE; BRUCE O. STAFFORD; RICHARD K. LOEHNING, JR.; TRACY B. MILLER; GARY L. JONES; ROBERT M. HAGY; WILLIAM A. MYERS; GENE F. NOONAN; KENNETH J. PUCHALSKI; ROBERT L. KEENAN; ROBERT F. GARLAND; DAVID A. GROWE; MICHAEL P. O'NEIL; TIMOTHY J. HOPPE; ALBERT G. KELSCH; STEVEN F. MASSEY; JOHN M. CRAWFORD; TARRELL L. NEWMAN; BILL G. HAMILTON; VERL W. MOORE; CHARLES W. ROHE; ALBERT W. GREENWOOD; GERALD A. GOMPERT; GARY L. KATIEPOLT; DICK C. JONES; JON LUTZ; CHARLES D. BARNHILL; LARRY G. WRIGHT; THOMAS W. SCHAEFER; JOHN C. ROSENSTOCK; STEVEN E. BISHOP; ROGER G. MAZANEC; EDWARD JAY DIETZ; STEVE V. BREW; LAVERN L. BROWN; DONALD MASEK; DONALD ROSEKRANS; ROBERT H. HALL; JACK A. REIGHARD; ROGER E. ROHRBOUCK; JAMES MORITZ; HAROLD JONES.

The Respondents in the proceedings below were Defendants-Appellees at Docket No. 94-8089. They are as follows:

UNITED TRANSPORTATION UNION; BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation.

Appearing as Amici Curiae at Docket No. 94-8089 were as follows:

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; EQUAL EMPLOYMENT ADVISORY COUNCIL.

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OPINIONS BELOW

The decision of the Court of Appeals for the Tenth Circuit is scheduled to be published, and appears in Appendix A, hereto. The decision of the United States District Court for the District of Wyoming may be found at *Hiatt v. Union Pacific R.R. Co.*, 859 F. Supp. 1416, 1434 (D. Wyo. 1994), and appears in Appendix B, hereto.

STATEMENT OF JURISDICTION

The district court had jurisdiction of this case under 28 U.S.C. §§ 1331, 1343, and 29 U.S.C. § 626(c). The Court of Appeals for the Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The following statutes are relevant to this litigation, and are set forth, verbatim, in Appendix J.

1. 29 U.S.C. § 621 (1988).

2. 29 U.S.C. § 623 (1988 & Supp. 1993).

3. 29 U.S.C. § 628 (1988).

4. 29 U.S.C. § 630 (1988)

5. 29 U.S.C. § 633 (1988).

6. 42 U.S.C. § 2000e (1988 & Supp. 1993).

7. 29 U.S.C. § 206 (1988 & Supp. 1993).

8. 29 C.F.R. § 1625.8.

9. Public Law No. 102-29, 105 Stat. 169 (1991).

STATEMENT OF THE CASE

A. Course of Proceedings

Petitioners filed both suits on July 16, 1993, alleging violations of the ADEA, 29 U.S.C. § 621 *et seq.* against United Transportation Union (UTU), Union Pacific Railroad, and Burlington Northern Railroad. The Defendant railroads filed their motions for summary judgment, alleging that their actions were required by Public Law. No. 102-29. (*See* App B, at 23a).

At the Initial Pretrial Conference (IPC) for both cases, the Magistrate granted Mr. Powers', counsel for Burlington Northern Railroad, request that all discovery be stayed. (*Id.* at 406a-07a, ¶¶ 3-4). Petitioners' counsel objected to this stay of discovery. (*Id.*). Nevertheless, the district court stayed all routine and formal discovery until the resolution of the dispositive motions to avoid expensive and time-consuming discovery. (*See* App. H, at 457a).

On November 4, 1993, oral argument was heard before the court regarding these various briefs and the issues raised. (App. H). At this hearing, Mr. McKendree expressed his concern regarding the lack of discovery, and the court assured him that Petitioners would not be penalized, in light of the procedural posture of these cases. (App. H, at 457a).

The district court denied the parties motions to dismiss for lack of subject matter, but granted summary judgment to Respondents. (App. B). The court held that it did have jurisdiction, but that the Petitioner Brakemen had not rebutted the Respondents' non-discriminatory reason for their actions,

namely compliance with a congressional mandate. (*Id.* at 40a). The court additionally held that the disparate impact theory was not viable for cases arising under the ADEA. *(Id.* at 58a).

The Petitioners appealed to The United States Court of Appeals for the Tenth Circuit. (*See* App. A). Petitioners argued that the district court's grant of summary judgment was in error, in face of the stay of discovery, which denied Petitioners the ability to fairly adjudicate their claims of discrimination. This issue was never addressed in the appellate opinion. (*See id.*).

The appellate court declined to reach the issue of whether the disparate impact doctrine is cognizable in cases arising under the ADEA. (*Id.* at 8a). Instead, the court affirmed the district court's grant of summary judgment on the grounds that the cases fell within the ADEA exemption for bona fide seniority systems. (*Id.* at 8a-11a).

B. Statement of the Facts

The facts alleged by Respondents are substantially the same as those in *United Transp. Union v. United States,* 987 F.2d 784 (D.C. Cir. 1993). The railroad industry wanted to eliminate the brakeman position. (App. B, at 18a-19a). However, since the crew consist agreement of December 5, 1980, brakemen had been promised that the reduction in the brakemen position would be made "entirely on the basis of attrition." (*Id.* at 17a-18a). Thus, many Brakemen relied upon these Crew Consist Agreements and chose not to accept promotion to Conductor. (App. E, at 129a-400a, ¶¶ 4-5). The railroad carriers and the union, United Transportation Union, could not agree on the carrier's proposal to force mandatory promotion for brakemen to conductor. (App. B, at 19a). The National Mediation Board (hereinafter, NMB) was requested to intervene and mediate the dispute. (*Id.*). The NMB was unable to achieve an agreement so, on May 3, 1990,

President Bush, pursuant to the RLA, appointed Presidential Emergency Board No. 219 (hereinafter, PEB) to make recommendations for resolution.

The Board recommended that brakemen be required to accept promotion to conductor. (*Id.* at 20a). UTU refused and a strike ensued. (*Id.* at 21a). This time Congress intervened, and passed Public Law No. 102-29. (*Id.*). This law codified the recommendations of the PEB board and directed a Special Board be appointed to review, clarify, if necessary, modify the recommendations of PEB 219. (*Id.*). This board decided not to modify the recommendations of PEB 219. (*Id.* at 21a-22a). Negotiations then commenced on the implementation of Public Law. No. 102-29, culminating in the 1991 Crew Consist Agreement at issue in this litigation. (*Id.* at 22a).

While the crew consist agreement eliminated the position of brakeman, it did not eliminate the work. (*See generally,* App. E, 130a-400a, ¶¶ 7, 11). This crew consist agreement was implemented with the knowledge that it would have a disparate impact on the older brakemen who had not previously taken promotion to conductor. (*Id.* 129a, ¶ 5, 130a-397, ¶ 6; 399a-400a, ¶¶ 5, 6, 8).

As a result of this suit, many Appellant Brakemen became the victims of harassment at the hand of management and fellow employees. (App. E; 132a, ¶ 11; 141a, ¶ 12; 153a, ¶ 5; 161a, ¶ 12; 165a, ¶ 8; 204a, ¶ 11; 208a, ¶ 11; 236a, ¶ 12; 244a, ¶ 11; 255a, ¶ 12; 259a, ¶ 11; 275a-76a, ¶ 12; 283a ¶ 11; 307a, ¶ 12; 320a, ¶ 11; 331a-32a, ¶ 12; 340a, ¶ 12; 344-45a, ¶ 12; 380a, ¶ 12; 388a, ¶ 12; 396a, ¶ 12). Furthermore, Petitioners are performing the more physical demanding work, and the worst runs, conditions they in which they worked when they were years younger. (App. E, at 130a-402a, ¶¶ 7-9).

SUMMARY OF ARGUMENT

The district court erroneously granted summary judgment in favor of Respondents after issuing a stay of discovery until after the determination of the dispositive motions. The defense raised by Respondents went entirely to the jurisdiction of the court, as well as preemption by the Railway Labor Act. Respondents made no significant attempt to rebut Petitioners' prima facie claim of discrimination focusing on events which occurred after the adoption of Public Law No. 102-29 and the special board. The district court misconstrued Petitioners' argument that the discrimination occurred in the manner by which Respondents chose to implement Public Law No. 102-29.

Furthermore, the district court erred in its determination that Petitioners failed to rebut Respondents' reasons for their actions which Petitioners alleged were pretextual in their disparate treatment claim. An examination of the evidence presented, giving Petitioners the benefit of all reasonable assumptions, clearly demonstrates an issue of fact regarding the Respondents' defense. Again, the court ignored Petitioners' argument that the alleged discrimination occurred after the enactment of Public Law No. 102-29. Respondents simply stated that the law required their actions, that statement simply is not so.

The district court also erred in its determination that the disparate impact theory, derived from Title VII, is not applicable to cases arising under the ADEA. The district court's ruling is contrary to the statutory language and design of the Age Discrimination in Employment Act and is contrary to the legislative history of the act.

Finally, the appellate court erred in affirming the district court's grant of summary judgment on the grounds that the seniority system was bona fide. While the appellate court held

that attacks on a seniority system may only be made pursuant to the disparate treatment doctrine, the court did not address Petitioners' concerns that this determination was premature and unfair given the stay of discovery. Additionally, the court erred in upholding the determination that insufficient evidence of discriminatory animus was presented by Petitioners, when such evidence was unrebutted.

STATEMENT OF STANDARD OF REVIEW

The review of the district court's grant of summary judgment is *de novo*, applying the same standard as the district court. *Hooks v. Diamond Crystal Specialty Foods, Inc.*, 997 F.2d 793 (10th Cir. 1993). The record is to be examined to determine if any genuine issue of material fact was in dispute and if it is determined that there is no such issue(s), this Court then must determine if the substantive law was correctly applied. *Applied Genetics Int'l., Inc. v. First Army Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). As to the review of the record for genuine issues of material fact, this Court must construe the pleadings and documentary evidence in favor of the Petitioners who were the parties in opposing the motion. *Id.* However, to survive summary judgment, the nonmoving party cannot rest on its pleadings and must "make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

REASONS FOR GRANTING THE WRIT

I.

DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT UNDER THE CIRCUMSTANCES AND WHILE DISCOVERY WAS STAYED AT DEFENDANTS' REQUEST.

As previously stated, a grant of summary judgment is reviewed *de novo. Universal Money Centers v. AT&T,* 22 F.3d 1527, 1529 (10th Cir. 1994). The discovery was stayed except for limited, directed discovery that would relate to the issue of the subject matter jurisdiction of the court, *i.e.,* the issues noted at the time as the "silver bullet" that would defeat subject matter jurisdiction of the court due to the operation of the Railway Labor Act. (App. F, at 406-07a, ¶4; 412a, ¶4).

As demonstrated *supra* concerning the Course of the Proceedings, Petitioners were limited to discovery on the principle issue presented by Petitioners dealing with the question of subject matter jurisdiction under the RLA. It became apparent very quickly that this argument did not, in fact, require discovery. (App. B, at 26a-29a). This turned out to be particularly true in face of the matters determined in *United Transp. Union v. United States,* 987 F.2d 784 (D.C. Cir. 1993).

Respondents produced evidence thereafter primarily directed at the subject matter jurisdiction issue and supported such claim on the basis of their alleged compliance with the congressional mandates contained in Public Law 102-29. Only Petitioners produced evidence of the post Public Law 102-29's Special Board's negotiations resulting in the crew consist agreements at issue being the source of the wrongdoing and discrimination that forms the gravamen of the complaint. Thus, no Rule 56(f) Affidavit was deemed warranted. In face of the

determination of the district court, Petitioners misapprehended the scope of the change in the thrust of the Petitioners' cases from the so-called "silver bullet" subject matter jurisdiction defense to the summary judgment issues presented. Thus, the course of the proceedings resulted in a denial of legitimate discovery rights to Petitioners on the ADEA issues presented outside the subject matter jurisdiction "silver bullet." *See, e.g., Universal Money Centers v. AT&T,* 22 F.3d 1527, 1536 (10th Cir. 1994) and *Burns v. Gadsden State Community College,* 908 F.2d 1512 (11th Cir. 1990).

As demonstrated *infra,* Respondents did not produce evidence in opposition to Petitioners' affidavits as to the content of the post Public Law 102-29 Special Board's negotiations. Until such evidence was forthcoming, no reason to rebut the evidence existed. However, the district court utilized the so-called "silver bullet" evidence as sufficient. Petitioners were reasonable in not expecting that determination given the status of the record. Moreover, Petitioners presented their position on the appropriateness for discovery concerning the post Public Law 102-29 Special Board's proceeding at oral argument. (App. H, at 457a; App. I, at 494a-96a).

The Supreme Court has held that, under Fed. R. Civ. P. 56(f), "summary judgment [should] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition," *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 n. 5 (1986). Of course, this protection usually arises if the nonmoving party files an affidavit explaining why he or she cannot present facts to oppose the motion. *Weir v. Anaconda Co.,* 773 F.2d 1073, 1082 (10th Cir. 1985). Moreover, there is no abuse of discretion if the court grants a motion for summary judgment where an affidavit under Fed. R. Civ. P. 56(f) is filed if it is otherwise appropriate. *Pasternak v. Lear Petroleum Exploration, Inc.,* 790 F.2d 828, 832-833 (10th Cir. 1986). Here,

the status of the record has been that until there is a rebuttal to the evidence of Petitioners concerning the age discrimination resulting from post Public Law 102-29 Special Board negotiations, summary judgment is not appropriate as material issues of fact exist as to an important element of the age discrimination claims presented. Here, however, the district court accepted a subject matter jurisdiction defense and superimposed it on the negotiations subsequent to the Special Board's proceedings. Petitioners respectfully submit that discovery will demonstrate the lack or denial of consideration to alternative provisions in their agreements which do not provide for age discrimination presented, *i.e.* dovetailing of years of service, redistribution of the work, runs or other tasks assigned so that the demeaning and more physically onerous work does not fall upon the aged. Such discovery will underscore the fact presented in the affidavits that there was direct knowledge of the discriminatory impact upon the aged of the new crew consist agreement and that such impact was intended as a device to force the aged off of the payroll or for some other invidious purpose. (App. E, App. 130a-31a, ¶¶ 6-8; 400a-01, ¶¶ 6-8). Such discovery will further underscore the agency status of those who have made age biased statements which are included, in part, in certain of the affidavits. *See* Affidavits of Brakemen (App. E, at 132a, ¶ 11; 141a, ¶ 12; 153a, ¶ 5; 161a, ¶ 12; 165a, ¶ 8; 204a, ¶ 11; 208a, ¶ 11; 236a, ¶ 12; 244a, ¶ 11; 255a, ¶ 12; 259a, ¶ 11; 275a-76a, ¶ 12; 283a ¶ 11; 307a, ¶ 12; 320a, ¶ 11; 331a-32a, ¶ 12; 340a, ¶ 12; 344a-45a, ¶ 12; 380a, ¶ 12; 388a, ¶ 12; 396a, ¶ 12). Therefore, this matter must be remanded for further proceedings and discovery.

II.

THE DISTRICT COURT ERRED IN HOLDING THAT THE PETITIONERS FAILED TO ESTABLISH THAT RESPONDENTS' REASONS FOR ACTIONS WERE PRETEXTUAL IN THEIR "DISPARATE TREATMENT" CLAIM.

Petitioners demonstrated that the district court erred in granting summary judgment against them on their age discrimination claim based upon the disparate treatment theory of recovery. The district court's determination was based upon Respondents' argument that Petitioners failed to establish a prima facie case of discrimination. (App. B, 24a). Summary judgment was inappropriate since there were material issues of fact presented and they were not entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In evaluating the Order Granting Summary Judgment, the pleadings and documentary evidence must be construed liberally and in favor of Petitioners who opposed the motion. *Florom v. Elliott Mfg.*, 867 F.2d 570 (10th Cir. 1989). Of course, disputes over facts that affect the outcome of the suit under governing law will preclude entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Review of the district court's determination is *de novo*. *Ten Mile Industrial Park v. Western Plains Service Corp.* 810 F.2d 1518, 1524 (10th Cir. 1987); *Goichman v. Aspen*, 859 F.2d 1466, 1467 (10th Cir. 1988). On appeal, the court must review the evidence in the light most favorable to the party opposing the motion. *McKenzie v. Mercy Hosp.*, 854 F.2d 365 (10th Cir. 1988). As demonstrated herein, more exists here than the "mere existence of some factual dispute", which may not preclude summary judgment. *Missouri Pacific, supra* at 862 F.2d 798 and *Anderson v. Liberty Lobby, Inc., supra* at 477 U.S. at 247-48.

As noted throughout, two basic theories of discrimination developed under Title VII: disparate treatment and disparate impact. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335, n.15, 371-72 (1977). Disparate treatment, the most obvious form of discrimination, simply is where an individual or class of individuals is treated less favorably than another because of race, color, religion, sex or national origin. *Id.* Proof of discriminatory intent is essential to the disparate treatment model, although it can be inferred "from the mere fact of differences in treatment." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Disparate treatment can be proven through direct evidence of discriminatory motive or by circumstantial evidence where there is no equality of treatment in application of legitimate work rules. *McDonald v. Santa Fe Transp. Co.*, 427 U.S. 273 (1976); *also see, Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 580 (1978). Petitioners met both of these requirements. (*See* App. E). The district court was in error for concluding to the contrary. (App. B).

Using the tenth circuit court's decision in *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419 (10th Cir. 1993) as a guide, the district court mistakenly noted that Petitioners' apparent efforts before it were simply to rely upon the absence of a discriminatory intent being established by Respondents. The district court wrongly found that Petitioners' position and arguments flew in the face of Petitioners' obligation to come forward with evidence of discriminatory intent. (App. B, at 37a-43a).

The district court concluded that Respondents presented a legitimate nondiscriminatory justification for the action at issue. The district court mistakenly found that Petitioners failed to present specific facts showing that the proffered justification was a pretext for discrimination and entered summary judgment on disparate treatment portion of the case. (App. B, at 37a-43a).

Petitioners have never denied they are charged with the burden of establishing age discrimination by a preponderance of the evidence. *See James v. Sears, Roebuck and Co., Inc., supra* at 992; *see also, McDonnell Douglas Corp. v. Green,* 411 U.S. 792, (1973); *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 358 (1977). The district court, in its analysis below, noted that the Respondents offered, in response to Petitioners' prima facie case, the non-discriminatory reason of compliance with a congressional mandate and that Petitioners failed to demonstrate that this asserted reason was a pretext. (App. B, 37a-43a). Indeed, the district court expressly stated that "[a]fter a careful review of the record, the Court finds that plaintiffs have failed to offer any evidence" of age based discrimination. (*Id.* at 40a). This conclusion is clearly in error. In accordance with the prevailing requirements for summary judgment, Petitioners raised genuine fact questions as to whether Respondents' reasons were pretextual. *See, e. g., Rea v. Martin Marietta Corporation,* 29 F.3d 1450 (10th Cir. 1994); *Cone v. Longmont United Hosp. Ass'n,* 14 F.3d 526, 530 (10th Cir. 1994), and *Drake v. City of Fort Collins,* 927 F.2d 1156, 1160 (10th Cir. 1991). Summary judgment was wrongfully entered because of the district court's conclusion that there was no evidence of discriminatory intention established by the limited status of the evidence permitted at this early stage in the litigation.

Lead Plaintiff (Petitioner in the Union Pacific case) Leonard Hiatt, in his affidavit, stated that the discrimination was not as a result of the claim of Respondents that they were merely complying with a government mandate but was a result of the decisions Respondents reached thereafter, i.e. after the Special Board's determination, at negotiations. (App. E, 129a, ¶ 5; *see generally,* App. H, at 435a-48a). Nowhere does the district court address the evidence of Petitioners' arguments that the ADEA violation occurred by the Respondents at the bargaining table after the Public Law 102-29 Special Board proceedings. The

circuit court compounds this error by establishing the false premise that Public Law 102-29 "in essence" concluded that the mandatory promotion provisions of the law were in fact "within the context of the established seniority system." (App. A, at 5a-6a). Neither Congress, Public Law 102-29, nor the Special Board made such a determination. All that those determinations mandated was the promotion of brakemen to conductor, which required implementation through the collective bargaining process.

Throughout such negotiations, Respondents "refused to consider the fact, in the new Crew Consist Agreement that younger promoted Conductors with far less years of service were going to be doing [the Petitioners'] jobs while [Petitioners] would be forced to do the work younger men had always performed, work" Petitioners did when they first hired out on the railroad. (App. E, 129a-30a, ¶ 5; *see also* 135a-396a, ¶¶ 8-9; 399a-402a, ¶¶ 4-10). Dismissal of this evidence as "mere boilerplate" is a deprivation of the rights of Petitioners under Rule 56(c), Fed. R. Civ. P. (App. B, at 41a n. 11).

Both lead Plaintiffs/Petitioners, in their affidavits, demonstrated the significant loss of seniority they suffered as a result of the negotiations between Respondents after the P.L. 102-29 formal proceedings. (App. E, at 131a, ¶¶ 8-10; 400a-02a, ¶¶ 7-11). Other Petitioners to this the suit have been similarly affected. (*See generally*, App. E, 135a-396a, ¶¶ 6-11)."Based on the seniority rosters alone it would have been impossible for the UTU and UPRC (Respondents Union Pacific) to not have known from the onset that their actions were going to create a disparate impact on the older protected employee, *i.e.*, age discrimination." (App. E, at 131a, ¶ 8). This is evidence of disparate treatment and sets forth a factual basis for the assertion that Respondents impermissibly acted on the basis of their age. (*See* App. B, at 40a-41a). This is the discrimination which the evidence demonstrates

Respondents knew would require Petitioners to perform the more physically demanding work during the undesirable hours. Work which Petitioners did when they initially began with the railroad. Work which Mr. Hiatt states he has not worked since 1962. The result of the post-formal Public Law 102-29 negotiations results in the fact that Mr. Hiatt "will never again be able to hold a regular road job" and "without doubt, shows age bias." Brakemen Affidavits, (App. E, 129a-131a, ¶¶ 5-9; 136a-401a, ¶¶ 6-7). This evidence, together with the other exhibits presented by Petitioners, demonstrates that despite the fact that no discovery was permitted, that under the summary judgment standards presented, Petitioners presented evidence from the post formal Public Law 102-29 negotiations, demonstrating Respondents intent to discriminate against them because of their age.[1]

The district court held Petitioners to an incorrect standard by disregarding their evidence. Respondents presented no evidence to rebut the facts summarized above concerning the discrimination visited upon Petitioners at the post Public Law 102-29 negotiations which resulted in the Crew Consist Agreement at issue, yet both the district and appellate courts concluded otherwise. Once Petitioners established the prima facie case which the district acknowledged they established, Respondents' only evidence was that they merely followed the mandates of Congress. (App. B, at 34a-35a, n. 8). Yet, the evidence was that the obligations created by Public 102-29 did not contain a requirement that Respondents enter into the crew consist agreement they chose after the formal Public Law 102-29 proceedings.

We conducted a careful review of the legislative history behind P.L. 102-29. We have examined the debates in both the

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1. A motion for Summary Judgment also raises issue of a constitutional nature where, as here, the non-moving party has requested, and would be entitled to have his claims resolved by the jury if the case went to trial.

Senate and House of Representatives by reference to Congressional Record, Vol. 137, No. 56, April 17, 1991, S-4657, *et seq.* and H-2363, *et seq.* We have examined President Bush's comments on the occasion of his execution of Public Law 102-29, U.S. Code and Cong. & Admin. News, Vol. 2, p. 99 (1991). There is nothing in the legislative history which mandates the Respondents to enter into the crew consist agreement at issue. All that is mandated is that such agreement contain a provision requiring mandatory acceptance of promotion to Conductor. The evidence is manifest that neither Respondent sought to preserve the rights of the older workers who either never held the title of Conductor or relinquished in some manner the right to hold such title, by dovetailing years of service or otherwise distributing the burden of having to work the longer hours and performing more physically demanding work resulting in the discrimination at issue. Nothing in Public Law 102-29 mandated that Respondents enter into a crew consist agreement that, in fact, did not dovetail years of service or mandate that the older workers be the ones who had to perform the physically more demanding work and requiring the older workers to work the longer hours. Consequently, the district court erred in concluding that Respondents were merely following a governmental mandate.

The district court failed, in addition, to recognize the similarity of this matter with *Cook v. Pan American World Airways, Inc.*, 771 F.2d 635 (2nd Cir. 1985). *Cook*, an age discrimination in violation of ADEA case, dealt with the merger of seniority rosters resulting from a merger of airlines and from proceeding under the Federal Aviation Act., 49 U.S.C. § 1378, *et seq.* In *Cook*, the Civil Aeronautics Board's determination resulted in the merger of the seniority rosters. Thus, the carrier and the union defendants claimed, inter alia, that the integrated seniority list formulated by the parties' mutually selected arbitrator pursuant to the CAB's decisions and orders could not be challenged in the ADEA suit since it was an "impermissible

collateral attack on a final order of the CAB" and they were merely complying with that legal obligation. This argument mirrors that determined below to be present in this case. The Second Circuit dismissed this argument for the reasons presented citing *McDonald v. City of West Branch,* 466 U.S. 284, (1984) (civil rights claim under 42 U.S.C. § 1983); *Barrentine v. Arkansas-Best Freight System, Inc.,* 450 U.S. 728 (1941) (minimum wage provisions of Fair Labor Standards Act); *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974) (Title VII). *Cook v. Pan American World Airways, supra* at 771 F.2d 641. In finding that the case should proceed under the ADEA, the court in *Cook* opined that since the CAB made no independent inquiry into the possible age discrimination, held no evidentiary hearing or that none of the parties presented an issue of age discrimination to the CAB, the claim of ADEA discrimination was available to proceed.

Here, Petitioners presented evidence of age discrimination resulting from the Respondents' negotiations after the formal Public Law 102-29 Special Board proceedings. Thus, the governmental mandates contained in Public Law 102-29 cannot excuse the discrimination resulting from those negotiations. The Petitioners were not permitted to depose the parties to those negotiations; however, they did present their direct evidence of disparate treatment of the Respondents in those negotiations. *Cook,* therefore, applies and this matter must proceed on the allegations and evidence of discrimination presented.

In addition, the evidence of disparate treatment from the statements of Respondents to Petitioners was also wrongfully dismissed by the district court as mere boilerplate. (App. B, at 41a n. 11). These affidavits were sworn to under oath. (*See generally,* 129a-403a). Thus, Petitioners showed age was a reason for the decisions which resulted in the Crew Consist Agreement and that reason was not mandated by Congress or any

agency under the Railway Labor Act. "[A]ge was a factor that made a difference." *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d 1166, 1170 (10th Cir.), *cert. denied*, 474 U.S. 946 (1985); *Perrell v. FinanceAmerica Corp.*, 726 F.2d 654, 656 (10th Cir. 1984); and *Cancellier v. Federated Dept. Stores*, 672 F.2d 1312, 1316 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982). Thus, disparate treatment has, for summary judgment purposes, been established and it was error for the district court to enter summary judgment against Petitioners on the disparate treatment theory of proof.

III.

THE TENTH CIRCUIT ERRED IN HOLDING THAT DEFENDANTS SIMPLY OBSERVED THE TERMS OF A BONA FIDE SENIORITY SYSTEM.

The Tenth Circuit held that the Respondents acted pursuant to a bona fide seniority system. (App. A, at 8a - 11a). First, the court recognized that, in cases arising under Title VII, a Plaintiff must challenge implementation of a seniority system by establishing intentional discrimination on the basis of the prohibited characteristic. (*Id.*, at 8a-9a). The disparate impact doctrine is simply inapplicable. (*Id.*); *see also International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982). This Court has never determined that, despite the different language of the statutory exemptions, the disparate impact doctrine is inapplicable to challenges to seniority systems in ADEA claims. *Compare*, 29 U.S.C. § 623(f)(2) *with* 42 U.S.C. § 2000e-2(h).

In this case, the parties were obligated to negotiate a new or a different seniority system to avoid discriminating against the older brakemen since neither P.L. 102-20, nor the Special Board

mandated promotion to be made in an unfairly harsh manner towards the older brakemen who had already paid their dues. Thus, contrary to the Tenth Circuit's allegation that these Respondents are desiring a special exception to seniority rights, these Respondents were lawfully entitled to expect that P.L. 102-29's mandatory promotion would be implemented in a lawful and nondiscriminatory manner. Whether or not the results at issue were intentionally reached as a result of discriminatory intent, by subterfuge, to avoid detection of that objective, or arrived at without caring about its effect is a motivation hidden from the Respondents by the stay of discovery. Thus, whether or not Title VII and the ADEA, on this point, must be interpreted differently is not ripe for decision in the current stage of the case.

IV.

THE ADEA APPROPRIATELY INCORPORATES THE DISPARATE IMPACT DOCTRINE OF TITLE VII.

The district court erroneously ruled that the disparate impact doctrine does not apply to cases arising under the ADEA. (App. B, at 58a). This issue was not resolved by the Tenth Circuit decision, since it asserted that the seniority system was bona fide. (App. A, at 10a-11a).

Considerable confusion has arisen among the circuits with respect to whether the district impact doctrine is applicable to ADEA cases. *Compare, MacPherson v. University of Montevallo*, 922 F.2d 766 (11th Cir. 1991); *Lyon v. Ohio Educ. Ass'n & Professional Staff*, 53 F.3d 135, 139-40 n. 5 (6th Cir. 1995); *Abbott v. Federal Forge, Inc.*, 912 F.2d 867 (6th Cir. 1990); *Holt v. Gamewell Corp.*, 797 F.2d 36, 37 (1st Cir. 1986); *EEOC v. Borden's Inc.*, 724 F.2d 1390, 1394 (9th Cir. 1984); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686 (8th Cir. 1983); *Geller v. Markham*, 635 F.2d 1027 (2nd Cir. 1980), *with*,

EEOC v. Francis W. Parker Sch., 41 F.3d 1073 (7th Cir. 1994); *DiBiase v. Smithkline Beecham Corp.*, 48 F.3d 719, 732-34 (3d Cir. 1995) (Arguing that disparate impact theory is not applicable to ADEA cases, but did not actually decide the issue). It is time to end this confusion and circuit split.

A. The Disparate Impact Doctrine Under Title VII

The disparate impact doctrine was originally announced by the United States Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). That case held that an employer ran afoul of Title VII by setting forth requirements for employment which operated "to disqualify Negroes at a substantially higher rate than white applicants" and where such requirements were not job related. *Id.* at 431. This was true even when it was proven that there was no discriminatory intent implementing such requirements. *Id.* at 429.

B. Title VII and the ADEA

The substantive portion of the ADEA is patterned after the substantive provisions of Title VII. *Compare*, 42 U.S.C. § 2000e-2 *with* 29 U.S.C. § 623. The nearly identical language demonstrates the fact that Congress intended the ADEA to prohibit *exactly the same* conduct as prohibited by Title VII. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985). In fact, this Court has emphasized the "important similarities between the two statutes." *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). Thus, principles of statutory construction require interpreting language the same when one statute is patterned after another. *Trans World Airlines, Inc.*, 469 U.S. at 121 (1985); *Knight v. State of Georgia*, 992 F.2d 1541, 1545 (11th Cir. 1993).

Critics have also argued that the ADEA should be interpreted differently from Title VII because, unlike Title VII, the ADEA

incorporates provisions of the Fair Labor Standards Act. 29 U.S.C. § 626; Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act,* 42 Fla. L. Rev. at 301.[2] Additionally, "[t]he fact that Congress provided for special remedies in the case of willful violations implies that an employee can recover for accidental and unintended violations of the ADEA as well as those that are knowing or intentional." *Kelly v. American Standard, Inc.,* 640 F.2d 974, 980 (9th Cir. 1981).

C. The Legislative History Supports Including Disparate Impact in ADEA Cases

One of the more forceful, but still flawed, arguments made against incorporating the disparate impact doctrine into the ADEA is that this would be contrary to the legislative intent of Congress. *See* Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act,* 42 Fla. L. Rev. 229, 287-90 (1990); Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine,* 34 Stan. L. Rev. 837, 844 (1982). The ADEA was drafted in response to the Department of Labor's report on the existence of age discrimination in June of 1965. *Id.* at 235; *see* U.S. Dep't of

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2. There is another very logical reason for incorporating the enforcement procedures of the Fair Labor Standards Act in the ADEA. Class actions brought pursuant to the Fair Labor Standards Act requires that members of the class must intentionally join in the class action suit. 29 U.S.C. § 216. This is different from most class action suits governed by Rule 23(c) of the Federal Rules of Civil Procedure where all members of the class are automatically included, and must opt-out if they desire not to be included in the suit. Precisely because age is different from race, in that people are constantly getting older, and because a person in the age protected class can be discriminated against in favor of younger people who are also in the age protected class, the opt-in procedure helps to guarantee that the class is narrowed to those who have truly been injured.

Labor, *The Older American Worker, Age Discrimination in Employment Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1965* (1965) [hereinafter Secretary's Report]. This report is often erroneously cited for the proposition that the ADEA was not meant to include the disparate impact doctrine. *See* Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 Fla. L. Rev. at 290. In fact, the Secretary's Report specifically states: "The 'discrimination' older workers have most to fear, however, is not from any employer malice, or unthinking majority, but from the ruthless play of wholly impersonal forces — most of them part of what is properly, if sometimes too casually, called 'progress.' " Secretary's Report at 3. Shortly thereafter, the report uses an example straight out of *Griggs*: "Any formal employment standard which requires, for example, a high school diploma will obviously work against the employment of many older workers — unfairly if, despite his limited schooling, an older worker's years of experience have given him the relevant equivalent of a high school education." *Id.* Thus, it seems clear that the Secretary's Report envisions utilization of the disparate impact doctrine. *See* Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 Fla. L. Rev. at 290-98.

Additionally, it should be remembered that the legislative history of Title VII lacks any indication that Congress intended to authorize liability under the disparate impact doctrine. Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. at 844. Since this Court did not view this fact as an obstacle to authorizing incorporation of the Disparate Impact doctrine into Title VII, it makes no sense to use the similar lack of legislative history as a bar to incorporation into the ADEA. *See* Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 Fla. L. Rev. at 291, 299. Again, it is important to realize that Congress *chose* the

substantive language of the ADEA from that of the substantive language of Title VII. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 Fla. L. Rev. at 300. Clearly, Congress' intent was for the ADEA to prohibit exactly the same conduct as Title VII.[3]

D. Reasonable Factors Other Than Age

Arguments against incorporation of the disparate impact doctrine in the ADEA have also been premised on statutory exemptions in the ADEA which are not in Title VII. Krop, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. at 844. The ADEA exempts employment practices which are based upon *reasonable* factors other than age. 29 U.S.C. § 623(f)(1). The argument makes the comparison between the ADEA and the Equal Pay Act which makes different pay scales lawful if based upon "*any* other factor than sex." 29 U.S.C. § 206(d)(1)(iv) (emphasis added). This Court has implied that this language of the Equal Pay Act bars a disparate impact claim. *County of Washington v. Gunther*, 452 U.S. 161, 170-71 (1981). Given the similarities of these statutory exemptions, it has been

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3. This is further evidenced by legislative remarks made regarding the ADEA. For example, Senator Javitz requested a N.Y. Times article, by William M. Freeman, be reproduced in the Congressional Record regarding the need for a federal law prohibiting age discrimination in the workplace. Part of that article addressed the reason why state laws against age discrimination were inadequate. The relevant part of the article reads: "While there are laws in some states forbidding such discrimination, there are many ways of declining to hire a specific individual without giving the true reason." 113 Cong. Rec. 9241 (1967). This certainly demonstrates Congress' concern with more than just overt discrimination.

Additionally, other remarks indicate that the ADEA was to fill in a gap left by Title VII and help protect older workers during reduction in forces. *See* 113 Cong. Rec. 9241, 24958 (1967); 111 Cong. Rec. 815, 15524, 16290 (1965).

argued that ADEA disparate impact claims must also be barred. Krop, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. at 844-48.

This argument fails because the ADEA exempts those requirements which are "reasonable" while the Equal Pay Act exemption reads "any" factor other than sex. In the ADEA, the modifier "reasonable" should be interpreted as including the defenses of business necessity and job relatedness; factors which have a disparate impact based on age is a defense to such a claim if it is "reasonable" (*i.e.*, is related to the position in question). (App. B at 52a); *See also, Hazen Paper Co. v. Biggins*, 113 S. Ct. at 1705 (1993); Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 Fla. L. Rev. at 304.

One court has concluded that this Court's decision in *Hazen Paper* indicates the Supreme Court's concern that any employment decision which is not made on the basis of age is immune from scrutiny under the ADEA; therefore, the disparate impact doctrine could never apply to cases arising under the ADEA, even though that case was specifically limited to ADEA *disparate treatment* cases. *See EEOC v. Francis W. Parker School*, 41 F.3d 1073 (7th Cir. 1994); *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993). In *Hazen Paper* this Court felt that in passing the ADEA, Congress was mainly concerned "that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes. *Hazen Paper Co.*, 113 S. Ct. at 1706. The Court felt that "[w]hen the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age. . . ." *Id.* The problem with incorporating this philosophy into cases arising under the disparate impact doctrine is "that the disparate impact theory of liability is designed as a means to detect employment

decisions that reflect 'inaccurate and stigmatizing stereotypes.' " *EEOC v. Francis W. Parker School*, 41 F.3d at 1079 (J. Cudahy, dissenting).

E. The Civil Rights Act of 1991

Another argument rejected by the district court is the idea that since Congress codified the disparate impact doctrine into Title VII and did not do so in the ADEA, that Congress expressly rejected the disparate impact doctrine for ADEA cases. (App. B, at 52a-55a). Given the fact that the disparate impact doctrine was derived from the identical language of Title VII, it seems clear that Congress felt no need to include it in the ADEA, since the language clearly supported the doctrine. In fact, the House Report for the 1991 amendments to Title VII states:

> A number of other laws banning discrimination, including the Americans with Disabilities Act of 1990 and the Age Discrimination in Employment Act (ADEA) are modeled after, and have been interpreted in a manner consistent with, Title VII.
>
> The Committee intends that these other laws modeled after Title VII be interpreted consistently in a manner consistent with Title VII *as amended by this Act*.

H.R. Rep. No. 40(II), 102d Cong., 1st Sess. 4 (1991) *reprinted in* (1991) U.S.C.C.A.N. 696-97 (citations omitted) (emphasis added). Thus, Congress fully expected the disparate impact doctrine would continue to be incorporated into the ADEA.

F. Age Is Not a Mutable Characteristic for Purposes of the ADEA

The district court based its holding that the ADEA does not allow for disparate impact claims on the ground that age is a mutable characteristic. (App. B, at 55a-58a). This argument asserts that discrimination is only actionable when the specific individuals have previously been targeted by discrimination by the business. However, that is not what is required by the ADEA. Congress was obviously aware that people's age change constantly. Nevertheless, Congress designed a statute to protect older workers. Congress has chosen to protect older individuals, despite the fact that they may not have previously faced discrimination, from stereotypes and assumptions regarding productivity and age, that the individual may fall victim to later in life. Should the district court's decision be adopted by this circuit, this protection will be gone. Employers will thus be able to lawfully discriminate against older workers by adopting employment policies which appear facially neutral but which employers know will have a disparate impact on age protected employees.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests the Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit in this matter, since the court below, as well as the United States District Court for the District of Colorado made plain error in granting summary judgment in these actions.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED SEPTEMBER 8, 1995

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 94-8088

LEONARD K. HIATT; ROBERT A. BAGBY; MARVIN CRABAUGH; GARY W. BOATRIGHT; RONALD L. ROBERSON; CARL D. HOUK; JERROLD B. HUTCHINGS; DUANE K. HINKLE; LARRY L. BURBACK; STEPHEN J. MILLER; KIM R. HARDMAN; KENNETH R. COVINGTON; MICHAEL E. VALENTINE; GARY L. YANKEN; PATRICK M. HERRLEY; MIKE I. CARLSON; RANDALL O. SWARTHOUT; SAMMY L. CROSS; DARRELL D. MILLER; RONALD L. STODDARD; JAMES D. TOLLE; LARRY S. CLARK; ROBERT T. EPLER; RICHARD W. CAVENDER; DALE YOUNG; ROBERT F. MCINTOSH; JULIAN R. NELSON; WALTER T. GRONEK; RONALD E. OSTENDORF; RONALD R. JOHNSON; MELVIN E. SAYRE; ROBERT F. LANNON; GERALD T. DUELING; PHILIP J. EBERHARDT; ROXIE L. JACKSON; RUSSELL P. EGGERS; RON G. VAN NORTHWICK; THOMAS M. MCMURTRY; LARRY R. MANN; MAURICE F. MCDONALD; DONALD A. RASCHKE; CLEO D. SCHROEDER; KENNETH W. MCINTOSH; ROBERT A. PODJENSKI; GILBERT R. THROM; DONALD K. PETERS; ROBERT G. WENZEL; CECIL B. MILLER; LEROY W. ROTH; JAMES L. WELLS; CHARLES F. SMARTT; JAMES W. JENKINS; JOHN J. STAMATE; GERRY W. SPINDEN; DAVID E. DUPREE; DONALD R. SMITH; JAMES P. MANARY; RONALD B. HUNT; ROBERT E. WILLIAMS; DENNIS J. SMITH; GARY E. METCALF; BENNY L. COVINGTON; ROBERT E. WEDGWOOD; NORMAN R. THOMAS; JON L. STONE; STEVEN L. BROWN; JOHN R.

Appendix A

HOLLOWAY; WARREN H. BUSH; EDWARD W. BERARDINO,

Plaintiffs-Appellants,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation; UNITED TRANSPORTATION UNION,

Defendants-Appellees,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; EQUAL EMPLOYMENT ADVISORY COUNCIL,

Amici Curiae.

No. 94-8089

JEROME J. SMITH; MICHAEL R. RAMOLD; MICHAEL X. KOSMICKI; RICHARD J. MCCUNE; DANIEL L. EASTMAN; DONALD E. LOOKER; ROBERT A. HARGER; STEVEN L. BURBACH; DONALD S. SEGHI; ROLAND G. BEARD; EARL J. VANCE; BRUCE O. STAFFORD; RICHARD K. LOEHNING, JR.; TRACY B. MILLER; GARY L. JONES; ROBERT M. HAGY; WILLIAM A. MYERS; GENE F. NOONAN; KENNETH J. PUCHALSKI; ROBERT L. KEENAN; ROBERT F. GARLAND; DAVID A. GROWE; MICHAEL P. O'NEIL; TIMOTHY J. HOPPE; ALBERT G. KELSCH; STEVEN F. MASSEY; JOHN M. CRAWFORD; TARRELL L. NEWMAN; BILL G. HAMILTON; VERL W. MOORE; CHARLES W. ROHE; ALBERT W. GREENWOOD; GERALD A. GOMPERT; GARY L. KATIEPOLT; DICK C. JONES; JON LUTZ; CHARLES D. BARNHILL; LARRY G.

Appendix A

WRIGHT; THOMAS W. SCHAEFER; JOHN C. ROSENSTOCK; STEVEN E. BISHOP; ROGER G. MAZANEC; EDWARD JAY DIETZ; STEVE V. BREW; LAVERN L. BROWN; DONALD MASEK; DONALD ROSEKRANS; ROBERT H. HALL; JACK A. REIGHARD; ROGER E. ROHRBOUCK; JAMES MORITZ; HAROLD JONES,

Plaintiffs-Appellants,

v.

UNITED TRANSPORTATION UNION; BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation,

Defendants-Appellees,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; EQUAL EMPLOYMENT ADVISORY COUNCIL,

Amici Curiae.

Appeal from the United States District Court
for the District of Wyoming
D.C. Nos. 93-CV-209 and 93-CV-210

John W. McKendree, Denver, Colorado (Richard Rideout of Herschler, Freudenthal, Salzburg, Bonds & Rideout, P.C., Cheyenne, Wyoming, with him on the briefs), for Plaintiffs-Appellants.

Douglas C. Herbert, Jr., of Lani, Schweiker, Shelton, Washington, D. C. (Brenda J. Council of Union Pacific Railroad Company, Omaha, Nebraska, with him on the brief), for Defendant-Appellee Union Pacific Railroad.

Appendix A

Kevin C. Brodar, Associate General Counsel, United Transportation Union, Cleveland, Ohio, for United Transportation Union.

Lawrence M. Stroik, Burlington Northern Railroad, Fort Worth, Texas (John A. Coppede of Sundahl, Powers, Kapp and Martin, Cheyenne, Wyoming, with him on the brief), for Defendant-Appellee Burlington Northern Railroad Company.

(James R. Neely, Jr., Deputy General Counsel; Gwendolyn Young Reams, Associate General Counsel; Vincent J. Blackwood, Assistant General Counsel; and Paul D. Ramshaw, Attorney, U.S. Equal Employment Opportunity Commission, on the brief for Amicus Curiae Equal Employment Opportunity Commission.)

(Robert E. Williams and Douglas S. McDowell, McGuiness & Williams, Washington, D. C., on the brief for Amicus Curiae Equal Employment Advisory Council.)

Before EBEL and McKAY, Circuit Judges, and COOK*, Senior District Judge.

McKAY, Circuit Judge.

This opinion resolves both *Hiatt, et al. v. Union Pacific, et al.* and *Smith., et al. v. Burlington Northern., et al.* The issues raised by the two cases are identical, and the cases were presented together at oral argument. We jointly refer to the plaintiffs in Hiatt

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* Honorable H. Dale Cook, Senior United States District Judge for the Northern District of Oklahoma, sitting by designation.

and Smith as "Plaintiffs" and, similarly, to the various defendants as "Defendants."

The opinion of the district court, see *Hiatt v. Union Pac. Co.*, 859 F. Supp. 1416 (D. Wyo. 1994), recounts in full the somewhat extensive background to this case. We offer here only the abridged story. From the advent of the diesel locomotive, the trains of this country were traditionally operated by a crew comprising an engineer, a conductor, and one or two brakemen. The march of progress did not leave this arrangement untouched, however; the virtual elimination of the caboose in recent decades substantially reduced the work historically performed by brakemen. In the early 1980s, the railroads, in an effort to reduce crew sizes to conform to modern needs, ceased to replace retired brakemen. Progress, alas, marched forward somewhat more quickly than did the brakemen, and by the late 1980s the railroads confronted both a daunting surplus of brakemen and a shortage of conductors. It is perhaps not surprising that the efforts of the railroads to negotiate a settlement with the United Transportation Union ("UTU") reached an impasse. In the end, it was necessary for Congress to legislate a solution to the brakeman problem.

Public Law No. 102-29, 105 Stat. 169 (1991), in essence, mandated that all brakemen be promoted to conductor unless a Special Board, appointed by the President, should find such action to be demonstrably inequitable or materially erroneous. The Special Board found no fault with the congressional solution, and the brakemen of this country were, after some further negotiations between the railroads and UTU, promoted to conductor.

For many older brakemen, however, promotion held, and holds, little allure. Under the seniority system long in place in the

railroad industry, brakeman seniority does not carry over when one is promoted to conductor.[1] Thus, a newly promoted conductor begins with no seniority, and takes his or her place at the bottom of the duty roster. This transition from experienced brakeman to junior conductor can be abrupt under the best of circumstances: one loses a great deal of choice over one's work, and must again toil at those duties that no one else desires. Traditionally, the prospect of a second stint of grunt work deterred a significant percentage of qualified brakemen from accepting promotion to conductor, and in fact the majority of the Plaintiffs chose to forego promotion and remain brakemen. Mandatory promotion, within the context of the established seniority system, thus thrust a rather traumatic, and unwanted, mid-life career change upon the Plaintiffs. As brakemen, the Plaintiffs could choose to work whatever runs suited them; as conductors, these same individuals must now take what they can get—at an age when their bodies are less resilient, and their lives more settled, than many younger men who hold greater conductor (but less overall) seniority. Unhappy with their situations, and believing themselves to have suffered because of their ages, the Plaintiffs filed suit under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634. The district court granted the Defendants summary judgment, and the Plaintiffs now appeal.

The Plaintiffs herein acknowledge that Public Law No. 102-29, as implemented by the Special Board, required that they be promoted to conductor. They do not here challenge that promotion. Rather, they attack the manner in which the Defendants effected the elimination of the brakeman position.

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1. Brakeman seniority is retained upon promotion to conductor, and in fact continues to accrue as one works as a conductor. The retained seniority is only relevant, however, when a brakeman chooses to bid for one of the very few remaining brakeman duty slots.

Specifically, the Plaintiffs contend that the Defendants failed to take measures to mitigate the uniquely deleterious impact of promotion upon the lives of older brakemen. The Plaintiffs assert that the Defendants could have preserved the ability of older brakemen to control their work schedules either by dovetailing brakeman seniority with conductor seniority or by otherwise redistributing the workload to spare older brakemen the more arduous tasks. The Plaintiffs claim that the failure of the Defendants to take these (or similar) steps gives rise to both a disparate impact and a disparate treatment claim. We address these claims in turn, reviewing the merits of the Plaintiffs' arguments *de novo*. We must first, however, resolve two threshold questions of jurisdiction. The Defendants, noting that Public Law 102-29 expressly precludes judicial review of the Special Board's findings, argue that the federal courts do not have subject matter jurisdiction to consider this appeal. We think their contentions misplaced. The Plaintiffs, as indicated above, challenge not the preferment authorized by the Special Board but the manner in which the Defendants carried out their statutory duties. We have jurisdiction to determine if the Defendants in performing those duties discriminated unlawfully on the basis of age.

The Defendants, in the alternative, argue that this case is in fact a minor dispute subject to mandatory arbitration under the Railway Labor Act. *See Hiatt*, 859 F. Supp. at 1423-26. We disagree for the reasons given by the district court. *See id.* at 1425-26. The Supreme Court, in *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557 (1987), held that the Railway Labor Act did not preclude claims of wrongful conduct brought under FELA. *See id.* at 564-67. We see no reason to reach a different result here. The Railway Labor Act, standing alone, cannot shield the Defendants from the ADEA. We turn now to the merits of the Plaintiffs' claims.

Appendix A

The district court, drawing upon the reasoning of Justice Kennedy's concurrence in *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993 (Kennedy, J., concurring), held that a claim of disparate impact was not cognizable under the ADEA. In the interim, the Seventh Circuit, in *EEOC v. Francis W. Parker School*, 41 F.3d 1073, 1076-78 (7th Cir. 1994), *cert. denied*, __U.S.__, 1995 WL 136915 (June 19, 1995), seemingly reached the same conclusion.[2] Recognizing that the question is as yet undecided in this circuit, *see Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1428 (10th Cir. 1993), we expressly decline to resolve it today. We instead affirm on more limited grounds the grant of summary judgment against the allegations of disparate impact.

Congress has excluded from the ambit of the statute even prohibited actions that are taken in "observ[ance of] the terms of a bona fide seniority system that is not intended to evade the purposes of [the ADEA]." 29 U.S.C.A. § 623(f)(2 (West Supp. 1995). Construing similar language contained in Title VII, see 42 U.S.C. § 2000e-2(h),[3] the Supreme Court has held that challenges to the effects of bona fide seniority systems may not be based upon assertions of disparate impact; rather, a plaintiff must prove intentional discrimination and therefore may claim only

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2. We say "seemingly" because Parker stops just shy of expressly holding that disparate impact claims may not be raised under the ADEA. *See Parker*, 41 F.3d at 1078 (Cudahy, J., dissenting).

3. "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment *pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate.*" 42 U.S.C.A. § 2000e-2(h) (West 1994).

disparate treatment. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 352-56 (1977); *see also Pullman-Standard v. Swint*, 456 U.S. 273, 276-77 (1982); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 64-65 (1982); *Harvey v. United Transp. Union*, 878 F.2d 1235, 1242-43 (10th Cir. 1989), *cert. denied*, 493 U.S. 1074 (1990); *Firefighters Inc. for Racial Equality v. Bach*, 731 F.2d 664, 667-69 (10th Cir. 1984).[4] We see no reason to place a different interpretation upon the essentially identical language of § 623(f)(2). We therefore hold that challenges to the routine operation of a bona fide seniority system must rest upon a claim of disparate treatment.

The Plaintiffs appear to concede that the seniority system employed by the railroad industry is bona fide as applied to those conductors who chose to accept promotion and forego the benefits of their brakeman seniority. *See* Aplt. Reply Brief at 17. There is no real question but that this conclusion is correct. The seniority system at issue applies equally to all workers and uses length of service as the primary criterion by which work is allocated, *see* EEOC ADEA Interpretation, 29 C.F.R. § 1625.8(a) (1994), and it is in all relevant respects comparable to the system approved in *Teamsters*, *cf.* 431 U.S. at 355-56. The Plaintiffs nonetheless contend that the seniority system is not bona fide as applied to them because they must now suffer burdens which have been thrust upon them: different rules have, in effect, been applied to them.

While recognizing that this argument holds some facial appeal, we nevertheless must reject it. Throughout this litigation, the Plaintiffs have consistently maintained that they do not

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4. We note that the disparate impact of a seniority system may nonetheless be evidence of intentional discrimination. *See Harvey*, 878 F.2d at 1244-45.

contest the impact of Public Law 102-29. They therefore cannot challenge their mandatory promotions or, necessarily, their lack of choice in accepting preferment. The Plaintiffs, moreover, admit that they were treated no differently under the seniority system than other newly promoted conductors. In essence, then, the Plaintiffs' argument reduces to the proposition that they should not be subject to the routine operation of the seniority system; rather, it should be modified to accord them favorable treatment.

We cannot accept the validity of this conclusion. The ADEA does not require biased decision-making. *See EEOC v. Sperry Corp.*, 852 F.2d 503, 509 (10th Cir. 1988) (" '[The ADEA] does not place an affirmative duty upon an employer to accord special treatment to members of the protected age group.' " (citations omitted)).[5] We likewise cannot conclude that the absence of narrowly targeted preferences strips an otherwise bona fide seniority system of its legitimacy. *Compare Trans World Airlines. Inc. v. Hardison*, 432 U.S. 63, 78-82, 83 (1977 ("TWA was not required by Title VII to carve out a special exception to its seniority system in order to help Hardison to meet his religious obligations."); *cf. also California Brewers Ass'n v. Bryant*, 444 U.S. 598, 605-07 (1980) ("[E]very seniority system must include rules that delineate how and when the seniority timeclock begins ticking . . . [and] must also have rules that define which passages of time will 'count' towards the accrual of seniority and which will not."). We therefore hold that the Plaintiffs' claims of

5. The Plaintiffs, in their briefs, appear to confuse the relief available under the ADEA with the factual predicates that give rise to a valid ADEA action. A court may, of course, remedy prior discrimination by modifying a seniority system to give victims greater seniority. *See Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976). The availability of such relief, however, need not support the proposition that the failure to favor older workers itself violates the act.

disparate impact, based as they are upon the operation of a bona fide seniority system, lack an adequate basis in law. The entry of summary judgment against these claims is affirmed.

We likewise affirm the district court's decision with respect to the Plaintiffs' allegations of disparate treatment. The district court found that the Plaintiffs "failed to offer any evidence that would permit a rational trier of fact to conclude that the defendants' actions were a pretext for intentional and unlawful discrimination on the basis of age." *Hiatt*, 859 F. Supp. at 1430. Our independent review of the evidence supports this conclusion. Reading the record in the light most favorable to the Plaintiffs, the Plaintiffs have established only that they were inconvenienced by the obligatory promotion to conductor. The Plaintiffs have adduced no evidence to refute the Defendants' contention that the alleged harm to the Plaintiffs was caused solely by the interaction of the congressional mandate and the established seniority system. Summary judgment was therefore proper. *See Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1455 (10th Cir. 1994) (holding that a plaintiff must "present[] specific facts significantly probative to support an inference that [the] proffered justifications were a pretext for discrimination"); *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 530 (10th Cir. 1994 (same).

The judgment of the district court is AFFIRMED.[6]

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6. Because our resolution to the issues of this case does not turn on the materials giving rise to the Appellees' Motion for Judicial Notice and the corresponding Motion to Strike filed by the Plaintiffs, we DENY the Motion for Judicial Notice and thereby MOOT the Motion to Strike.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT, DISTRICT OF WYOMING DATED AUGUST 3, 1994

147 L.R.R.M. (BNA) 2143, 67 Fair Empl.Prac.Cas. (BNA) 351

Leonard K. HIATT, Robert A. Bagby, Marvin Crabaugh, Gary W. Boatright, Ronald L. Roberson, Carl D. Houk, Jerrold B. Hutchings, Duane K. Hinkle, Larry L. Burback, Stephen J. Miller, Kim R. Hardman, Kenneth R. Covington, Michael E. Valentine, Gary L. Yanken, Patrick M. Herrley, Mike I. Carlson, Randall O. Swarthout, Sammy L. Cross, Darrell D. Miller, Ronald L. Stoddard, James D. Tolle, Larry S. Clark, Robert T. Epler, Richard W. Cavender, Dale Young, Robert F. McIntosh, Julian R. Nelson, Walter T. Gronek, Ronald E. Ostendorf, Ronald R. Johnson, Melvin E. Sayre, Robert F. Lannon, Gerald T. Dueling, Philip J. Eberhardt, Roxie L. Jackson, Russell P. Eggers, Ron G. Van Nortwick, Thomas M. McMurtry, Larry R. Mann, Maurice F. McDonald, Donald A. Raschke, Cleo D. Schroeder, Kenneth W. McIntosh, Robert A. Podjenski, Gilbert R. Throm, Donald K. Peters, Robert G. Wenzel, Cecil B. Miller, Leroy W. Roth, James L. Wells, Charles F. Smartt, James W. Jenkins, John J. Stamate, Gerry W. Spinden, David E. Dupree, Donald R. Smith, James P. Manary, Ronald B. Hunt, Robert E. Williams, Dennis J. Smith, Gary E. Metcalf, Benny L. Covington, Robert E. Wedgwood, Norman R. Thomas, Jon L. Stone, Steven L. Brown, John R. Holloway, Warren H. Bush, Edward W. Berardino,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah Corporation; and United Transportation Union,

Defendants.

Appendix B

Jerome J. SMITH, Michael R. Ramold, Michael X. Kosmicki, Richard J. McCune, Daniel L. Eastman, Donald E. Looker, Robert A. Harger, Steven L. Burbach, Donald S. Seghi, Roland G. Beard, Earl J. Vance, Bruce O. Stafford, Richard K. Loehning, Jr., Tracy B. Miller, Gary L. Jones, Robert M. Hagy, William A. Myers, Gene F. Noonan, Kenneth J. Puchalski, Robert L. Keenan, Robert F. Garland, David A. Growe, Michael P. O'Neil, Timothy J. Hoppe, Albert G. Kelsch, Steven F. Massey, John M. Crawford, Tarrell L. Newman, Bill G. Hamilton, Verl W. Moore, Charles W. Rohe, Albert W. Greenwood, Gerald A. Gompert, Gary L. Katiepolt, Dick C. Jones, Jon Lutz, Charles D. Barnhill, Larry G. Wright, Thomas W. Schaefer, John C. Rosenstock, Steven E. Bishop, Roger G. Mazanec, Edward Jay Dietz, Steve V. Brew, Lavern L. Brown, Donald Masek, Donald Rosekrans, Robert H. Hall, Jack A. Reighard, Roger E. Rohrbouck, James Moritz, Harold Jones,

Plaintiffs,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware Corporation; and United Transportation Union,

Defendants.

Nos. 93-CV-0209-B, 93-CV-0210-B.

United States District Court, D. Wyoming.

Aug. 3, 1994.

* * *

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Richard Rideout, Cheyenne, WY, and John W. McKendree, Denver, CO, for plaintiffs.

John B. Rogers, Robert G. Pickering, Cheyenne, WY, Brenda J. Council, Union Pacific R. Co., Omaha, NE, Keven C. Brodar, United Transp. Union, Cleveland, OH, for defendants.

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

BRIMMER, District Judge.

The above entitled matter having come before the Court on the Defendants' Motions to Dismiss or, in the alternative, for Summary Judgment, the Plaintiffs' Combined Opposition thereto, as well as the supplemental briefs of the parties as per this Court's order, and the Court, having reviewed the materials in the file, having heard oral argument from the parties and being fully advised in the premises, hereby FINDS and ORDERS as follows:

Background

This case revolves around the interpretation and effect of an act of Congress which was signed into law on April 18, 1991, by then-President George Bush. *See* Pub.L. No. 102-29, 105 Stat. 169 (1991). The complaints in these two cases, which have been consolidated for pretrial purposes by an order of this Court, were filed by former employees of defendants Union Pacific Railroad ("UPRR") and Burlington Northern Railroad ("BNRR"). The plaintiffs named UPRR, BNRR and the United Transportation Union ("UTU") as defendants in these actions. All of the named plaintiffs had been employed by the defendants as brakemen until they were forced to accept mandatory promotions to conductor. It

is this mandatory promotion issue that is at the heart of these disputes.

The complaints allege that the actions of the defendants in implementing certain portions of Public Law 102-29, namely the "crew consist procedures," discriminated against the plaintiffs on the basis of their age in violation of the Age Discrimination in Employment Act, *29 U.S.C. Sec. 621* et seq. (1988) ("ADEA"). The plaintiffs seek a declaratory judgment that the defendants' actions violated the ADEA, a prospective injunction against further violations, an order directing the defendants to take affirmative steps to eliminate the effects of their actions, an order reinstating their brakemen's seniority and compensatory damages, attorneys' fees and costs.

All three defendants have filed motions to dismiss or, in the alternative, for summary judgment, with respect to the complaints. Before the Court can address the merits of these motions, however, it is necessary to review the relevant statutory framework and the events that formed the basis for these suits.[1]

A. *The Railway Labor Act*

The labor dispute that led to the present litigation requires an understanding of the congressionally designated procedures for

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1. An excellent summary of the history and background of the present dispute can be found in two opinions from the federal courts in Washington, D.C.. *See Burlington N.R.R. Co. v. United Transp. Union et al., 822 F.Supp. 797* (D.D.C.1991), *aff'd sub nom. United Transp. Union v. United States, 987 F.2d 784* (D.C.Cir.1993). The District of Columbia litigation involved an unsuccessful challenge by the UTU to the constitutionality of Public Law 102-29 under Congress' Article I Commerce Clause power. *See* U.S. CONST. art. I, Sec. 8, cl. 3.

resolving labor disputes in the railroad industry and the negotiation and collective bargaining processes.

The Railway Labor Act ("RLA"), *45 U.S.C. Sec. 151 et seq.* (1988) regulates the process of collective bargaining in the railroad industry. It establishes a multi-tiered process by which either party to a collective bargaining agreement may formally propose to change the terms of an existing agreement.[2] This formal procedure requires a party proposing a change to the agreement to serve a notice pursuant to Sec. 6 of the RLA. *Id.* Sec. 156. After service of a Sec. 6 notice, the RLA requires the parties to enter into negotiations regarding the proposed changes to the collective bargaining agreement. If the parties cannot reach an agreement, then they may invoke the statutorily defined assistance of the National Mediation Board ("NMB"). *Id.* Sec. 155. If the NMB is unsuccessful in mediating an agreement, then the parties may submit the dispute to binding arbitration. *Id.* Sec. 157. If arbitration is not pursued, and the NMB believes that the failure to reach an agreement may threaten interstate commerce, then the NMB is required by statute to notify the President of this situation. *Id.* Sec. 160. The President is then authorized to appoint a Presidential Emergency Board to investigate the matter and issue a recommendation. *Id.*

Of course, one obvious problem with the procedures contained in the RLA is in the absence of any limits on the number of Sec. 6 notices that may be served by any party to a collective bargaining agreement. Thus, the parties could, in

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2. Negotiations can occur at either the local or the national level. Local negotiations typically involve one railroad and one or more unions; in contrast, national negotiations occur between multiple railroads and unions, and are referred to in industry parlance as "national handling." *See Burlington Northern, 822 F.Supp. at 799.*

theory, seek to renegotiate the terms of their collective bargaining agreements *ad infinitum*. In an effort to avoid this possibility and to bring some stability to these agreements, the parties to these agreements (the carriers and the unions) often place a moratorium clause within their agreements. These moratoria provisions are simply bilateral agreements whereby each side agrees that it will not invoke the RLA procedures to reopen negotiations on a particular aspect of a collective bargaining agreement for a specific period of time.

B. *The History of the Present Cases*

1. *Background*

In 1980, Congress passed the Staggers Rail Act, Pub.L. No. 96-448, which essentially deregulated the rail industry. Since that time, the nation's major rail carriers, including defendants UPRR and BNRR, have attempted to reduce the size of their train crews. Historically, the number of men necessary to form a crew was determined by what are known as crew consist agreements. A traditional train crew consisted of an engineer, a conductor, a fireman and either two or three brakemen. Due to technological advances, however, including the advent of the diesel locomotive, the positions of fireman and third brakeman have become obsolete and have been virtually eliminated. *See Brotherhood of R.R. Trainmen v. Akron &Barberton Belt, 385 F.2d 581, 588 92* (D.C.Cir.1967).

The present litigation began when the unions and the carriers entered into a crew consist agreement on December 5, 1980. This agreement provided that all standard road freight and yard crews would consist of "not less than" one conductor and two brakemen. Subsequent reductions in these positions was to be

entirely on the basis of attrition. The parties also agreed to a moratorium with respect to the crew consist aspect of this agreement for a specified period of time.

The carriers, however, have recently demonstrated an increased resistance to the brakeman's position because of their belief that its function is obsolete. As a result, the carriers have attempted to eliminate as many of those positions as possible for obvious economic reasons. Unfortunately for the carriers, reduction by attrition has been too slow and the moratoria provision in the crew consist agreement has prevented the carriers from attempting to reopen negotiations on this issue. As a result, the carriers have retained what they perceive to be the excess brakeman's positions.

In July of 1988, a majority of the UTU's local arms served Sec. 6 notices on the carriers in an effort to modify particular portions of the then-existing collective bargaining agreements. Specifically, the unions sought to improve the wages and health care benefits of their members, which included almost all of the firemen, conductors, brakemen, yardmen and yardmasters employed by the carriers. The service of the Sec. 6 notices opened the negotiations process described above, but only with respect to the matters designated therein.

In October of 1988, the carriers filed their own Sec. 6 notices which contained a counter-proposal seeking dramatic wage cuts for its employees. Sensing an opportunity to renegotiate the important new consist issue, the carriers offered an alternative proposal: a smaller wage cut than the one initially proposed in exchange for the unions' agreement to reopen negotiations on the crew consist matter. The carriers' intent to reduce the number of brakemen by reopening the negotiations on that issue was plainly

apparent from their Sec. 6 notices, which stated that they wanted to require any train service employee to accept a promotion to conductor and/or engine service or forfeit their seniority and terminate the employment relationship.

This so-called "mandatory promotion" requirement forms the basis for the complaints filed in this case. The carriers sought to reduce the number of brakemen while at the same time increasing the number of conductors, a position that was undermanned, by promoting the extra brakemen to conductor status. The unions, however, refused to consent to renegotiate the crew consist agreements, relying on the moratoria provisions to prevent renegotiation of this issue. Thus, the dispute was now ripe to move to the national handling phase.

2. *The National Level*

At the national level, the local unions were represented by the UTU, and the carriers were represented by the National Carriers' Conference Committee ("NCCC"), the bargaining arm for national negotiations for the National Labor Railway Conference, an association of the nation's major carriers. It became readily apparent that the negotiations at this level were not going to produce any results, and the parties thereafter sought the assistance of the NMB. The NMB's year-long effort to mediate this dispute also failed to improve this stalemate. The parties subsequently refused to submit their dispute to arbitration. At that point, the NMB certified to President Bush that this dispute could in fact threaten interstate commerce.

On May 3, 1990, President Bush, acting pursuant to his statutory grant of authority, *see* 45 *U.S.C. Sec. 160* (1988), and in accordance with the recommendation of the NMB, appointed

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Presidential Emergency Board 219 ("PEB" or "the Board") to investigate the dispute between the carriers and the unions and to issue a recommendation. *See* EXEC. ORDER NO. 12714, 55 Fed.Reg. 19,047 (1990).

The Board conducted extensive hearings and heard testimony from numerous interested parties. Both the UTU and the carriers argued the mandatory promotion issue before the Board. The UTU vehemently opposed this proposal while the carriers argued that it was necessary because there were too many brakemen positions that were no longer needed and which they were being forced to fund, while they were simultaneously suffering from a shortage of conductors. Thus, the carriers claimed that the requirement that brakemen accept a promotion to conductor status would be more efficient and would eliminate the excess brakemen.

On January 15, 1991, the Board issued its report and recommendations to President Bush. The Board recommended that the carriers' proposal for a wage cut be rejected, and furthermore, that a series of wage increases be given. In return for the wage increases, however, the Board recommended that the moratoria provisions of the earlier crew consist agreements be lifted, that the parties be permitted to serve Sec. 6 notices locally on the crew consist issue and that a new round of negotiations on this issue take place. The Board also recommended that the disputes should be subject to binding arbitration unless the parties voluntarily reached new crew consist agreements by October 31, 1991. Finally, and perhaps most significantly for purposes of this case, the Board adopted the carriers' position on the mandatory promotion issue and recommended that "all brakemen who are offered promotion to conductor should be required to accept such promotion."

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Acting on these recommendations, the carriers then served their Sec. 6 notices seeking to renegotiate the crew consist agreements. Although some of the parties voluntarily reached agreements, others did not. On April 17, 1991, the inability to agree on these matters culminated in a strike by the unions and the UTU. Later that same day, Congress intervened and enacted what was essentially the Board's recommendations. The bill containing these recommendations was passed by the House of Representatives and the Senate and signed into law the next morning by President Bush. The bill is now codified as Public Law 102-29.

Section 2 of that law specifically required the President to appoint a special presidential board ("Special Board") which would be empowered to conduct additional hearings for the purpose of clarifying, interpreting, and, if necessary, modifying the recommendations of PEB 219, now Public Law 102-29, if the Special Board determined that they were demonstrably inequitable or materially erroneous. Certain provisions of Public Law 102-29 are directly relevant to this litigation. Under Sec. 1(3), the findings of the Special Board were to become binding on the parties ten days after they were issued and those findings were to be given "the same effect as though arrived at by agreement of the parties" under the RLA. In addition, Sec. 3(g) of the law provided that there shall be no judicial review of "any report or determination of the Special Board under this section."

Pursuant to this congressional mandate, President Bush appointed a three-member Special Board on July 18, 1991. The UTU appealed the Board's ruling on the mandatory promotion issue to the Special Board, but their appeal was rejected on the grounds that the Board's ruling was fair and not materially erroneous. The Special Board thus allowed the carriers to serve

their Sec. 6 notices to renegotiate their respective crew consist agreements at the local level. The carriers thereafter served their notices, and on October 25, 1991, BNRR and the UTU reached an agreement on the crew consist issue. UPRR and the UTU entered into a separate agreement on December 19, 1991. As expected, the terms of the new agreements incorporated the mandatory brakemen promotion requirement.

It is this mandatory promotion language in the crew consist agreements that forms the basis for the present lawsuits. In short, the plaintiffs allege that the portion of the collective bargaining agreements requiring them to accept mandatory promotions to conductor status impermissibly discriminates against them on the basis of their age in violation of the ADEA.

3. *The Contentions of the Parties*

The plaintiffs allege that the requirement that they accept a promotion to conductor deprives them of their seniority within their craft.[3] They further argue that they relied on the earlier crew consist agreements in passing up opportunities for promotions to conductor at earlier dates since they were told that they would not be adversely affected if they declined to accept those promotions. In other words, they relied on the earlier agreements in order to preserve their accumulated brakeman's seniority; if they had accepted the earlier offers for promotions to conductor, then they would have more seniority than people who accepted a

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3. Seniority is based on a particular craft. Thus, UPRR and BNRR had separate seniority systems for their conductors, brakemen, firemen and yardmen. If, for whatever reason, an individual transfers from one craft to another, then he would essentially forfeit all of his seniority in that craft and he would start his new craft with no seniority.

promotion to conductor after the plaintiffs passed up their opportunities. Finally, the plaintiffs argue that they have been treated less favorably since the mandatory promotions took effect, and that this less favorable treatment is due, at least in part,[4] to their age.

The defendants' argument is three-fold. Initially, they assert that they cannot be held liable for actions taken in accordance with a congressional mandate. As a result, they have moved for summary judgment pursuant to Rule 56.[5] In the alternative, they contend that the crux of the plaintiffs' complaints involves disputes over seniority and wages and not age discrimination. These types of disputes, classified under the RLA as "minor disputes," *see Union Pacific R.R. Co. v. Sheehan, 439 U.S. 89, 94, 99 S.Ct. 399, 402, 58 L.Ed.2d 354* (1978) (*per curiam*), are subject to the exclusive jurisdiction of the National Railroad Adjustment Board ("NRAB") which provides for compulsory and binding arbitration. *See Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, 491 U.S. 299, 30304, 109 S.Ct. 2477, 2480-81, 105 L.Ed.2d 250* (1989). As a result, the defendants assert that this Court has no subject matter jurisdiction over these claims. *See Trainmen v. Chicago, R. & I. R.R. Co., 353 U.S. 30,*

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4. The phrase "at least in part" is used because the plaintiffs have argued, *inter alia*, that the defendants have intentionally discriminated against them based on their age. In the alternative, however, they argue that this is a "mixed motive" case of discrimination and that while their age may not have been the deciding factor, it was nonetheless a determining factor that motivated the defendant. *See Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268* (1989).

5. Because the parties have relied on materials outside of the complaint, the motion is more properly viewed as a motion for summary judgment, *see* FED.R.CIV.P. 12(b), rather than a motion to dismiss under Rule 12(b)(6).

40, 77 S.Ct. 635, 640, 1 L.Ed.2d 622 (1957); *Watts v. Union Pacific R.R. Co., 796 F.2d 1240, 124243* (10th Cir.1986). They assert that the plaintiffs cannot "artfully plead" their way around the conclusion that these claims are minor disputes and not age discrimination claims. Thus, they seek a dismissal pursuant to Rule 12(b)(1). Finally, the defendants assert that dismissal is warranted on the merits because the plaintiffs have failed to establish a prima facie case of age discrimination.

As far as the claims against the UTU, it should be pointed out that the plaintiffs' claims against this defendant are not predicated on an alleged breach of the duty of fair representation. Rather, the plaintiffs allege that UTU is liable for its participation in implementing a crew consist agreement that discriminates against the plaintiffs on the basis of their age.[6]

Standard of Review

The standard for summary judgment is well-established and need not be recited in great detail here. *See Central Wyoming Law Assoc's, P.C. v. Denhardt, 836 F.Supp. 793, 798* (D.Wyo.1993) (Brimmer, J.); *White v. Continental Gen. Ins. Co., 831 F.Supp. 1545, 1551-52* (D.Wyo.1993) (Brimmer,].). "By its very terms, [the Rule 56(c)] standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment;

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6. The issue of whether the UTU breached its duty of fair representation was raised and decided in another federal action. In *Local 1389, United Transp. Union v. CSX Transp., Inc. et al.*, slip op., 1992 WL 675144 (E.D.Ky.Apr. 17, 1992), the plaintiffs brought a duty of fair representation claim against the UTU with respect to its representation of the union members during the proceedings culminating in Public Law 102-29. The Court in that case granted the defendants' motions for summary judgment, finding that UTU did not breach its duty of fair representation.

the requirement is that there is no *genuine* issue of material fact." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202* (1986) (emphasis in original).

The trial court decides which facts are material as a matter of law. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id. at 248, 106 S.Ct. at 2510; see also Carey v. United States Postal Serv., 812 F.2d 621,* 623 (10th Cir.1987). Summary judgment may be entered "against a party who fails to make a sufficient showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof" *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265* (1986); *Carey, 812 F.2d at 623.* The relevant inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Carey, 812 F.2d at 623.* In considering a party's motion for summary judgment, the court must examine all evidence in the light most favorable to the nonmoving party. *Barber v. General Elec. Co., 648 F.2d 1272,* 1276 *n. 1* (10th Cir.1981).

Discussion

A. *Subject Matter Jurisdiction*

Because this Court must satisfy itself that it has subject matter jurisdiction over this cause of action before it may reach the merits of the case, the Court will address this argument first.

The defendants' argument is that the plaintiffs may not circumvent the exclusive jurisdiction of the NRAB by

recharacterizing their claims as something other than what they really are, which, according to the defendants, is nothing more than a minor dispute over wages and seniority. The defendants' claim rests on the "artful pleading" doctrine first enunciated in *Magnuson v. Burlington N., Inc., 576 F.2d 1367, 1369* (9th Cir.), *cert. denied, 439 U.S. 930, 99 S.Ct. 318, 58 L.Ed.2d 323* (1978) and followed in *Stephens v. Norfolk and Western Ry. Co., 792 F.2d 576, 580* (6th Cir.1986) and *Leu v. Norfolk and Western Ry. Co., 820 F.2d* 825, 830 (7th Cir.1987). For reasons given below, this Court finds that this argument is misplaced and that this Court does in fact possess subject matter jurisdiction to hear and adjudicate the plaintiffs' claims.

Initially, it is a well settled principle that "the party who brings suit is master to decide what law he will rely upon[.]" *See Drake v. Cheyenne Newspapers,* Inc., *842 F.Supp. 1403, 1406* (D.Wyo.1994) (Brimmer, J.) (quoting *The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25, 33 S.Ct. 410, 411, 57 L.Ed. 716* (1913) (Holmes, J.)). Because the plaintiff is the master of the complaint, any attempt to preempt that party's decision as to the substantive law on which the claims in their complaint are predicated must be evaluated with great care.

In this particular area of the law, some courts have recognized that a plaintiff may not convert a minor dispute which would otherwise be nonjusticiable by a court into a claim that is justiciable merely by pleading it as such. More specifically, the "artful pleading" doctrine provides that:

> [e]mployees' attempts to evade NRAB exclusive jurisdiction over minor disputes by recharacterizing their claims into *state causes of action* are scrutinized by the following test:

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> [i]f the action is based on a matrix of facts which are inextricably intertwined with the grievance machinery of the collective bargaining agreement and of the R.L.A. [, then] exclusive jurisdiction of the NRAB preempts the action.

Leu, 820 F.2d at 830 (citations omitted) (emphasis added). The problem with the defendants' reliance on the artful pleading line of cases is that they all involve situations where the plaintiffs have attempted to characterize their claims as state law tort claims. *See Leu 820 F.2d at 830* (fraud and conversion); *Stephens, 792 F.2d at* 580 (wrongful discharge and intentional infliction of emotional distress); *Magnuson, 576 F.2d at 1368* (intentional infliction of emotional distress). Thus, the apparent reason that those courts have refused, correctly, to allow the plaintiffs to pursue their claims as state law tort claims is tied to preemption issues involving labor matters.

In the present case, however, the plaintiffs do not claim that they are alleging state law tort claims, but rather, have asserted an independent statutory right afforded to them by Congress under the ADEA: the right to be free from arbitrary discrimination in the workplace on the basis of their age. As a result, the preemption concerns that drove the artful pleading doctrine in the cases above are absent in this case.

Moreover, this distinction is significant, as was noted by the *Leu* court in a footnote. *See Leu, 820 F.2d at 830 n. 9* (referring to *Atchison, T. & S.F. Ry. v. Buell, 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed.2d 563* (1987). Although the *Buell* case presented a "very different question" from the issue in *Leu, Buell is* directly relevant to the case at bar, notwithstanding the fact that it was not cited in any of the parties' briefs.

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In *Buell,* the carrier argued that the plaintiffs Federal Employers' Liability Act ("FELA") claim for damages arising from the defendants' alleged negligence was beyond a federal court's subject matter jurisdiction because it was a minor dispute that was subject to the exclusive jurisdiction of the NRAB. *See Buell, 480 U.S. at 558-563,107 S.Ct. at 1411-1414.* The district court agreed and granted the carrier's motion for summary judgment. The Ninth Circuit reversed and the Supreme Court affirmed that portion of the appeals court's decision. *Id. at* 567, *107 S.Ct. at 1416.* In so holding, the Supreme Court expressly stated several principles that are directly relevant to the case at bar.

> [T]he Railroad argues that an FELA action for damages is barred. We find no merit in this argument. The fact that an injury otherwise compensable under the FELA was caused by conduct that may have been subject to arbitration under the RLA *does not deprive an employee of his opportunity to bring an FELA action for damages.* . . . [W]e have never considered that possibility a bar to an employee's bringing an FELA claim for personal injuries . . . *This Court has, on numerous occasions, declined to hold that individual employees are, because of the availability of arbitration, barred from bringing claims under federal statutes. See, e.g., McDonald v. West Branch, 466 U.S. 284 [104 S.Ct. 1799, 80 L.Ed.2d 3021* (1984); *Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 [101 S.Ct. 1437, 67 L.Ed.2d 6411 (1981); Alexander v. Gardner*

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> *Denver, 415 U.S. 36 [94 S.Ct. 1011, 39 L.Ed.2d 147]* (1974). Although the analysis of the question under each statute is quite distinct, the theory running through these cases is that notwithstanding the strong policies encouraging arbitration, 'different considerations apply where the employee's claim is based on rights *arising out of a statute designed to provide minimum substantive guarantees to individual workers.' Barrentine, 450 U.S. at 737 [101 S.Ct. at 1443].*

Buell, 480 U.S. at 564-65, 107 S.Ct. at 1415 (emphases added). The Court went on to state that "absent an intolerable conflict between the two statutes, we are unwilling to read the RLA as repealing any part of the FELA." *Id. at 566-67, 107, S.Ct. at 1416.* For the reasons set forth in *Buell,* which are directly analogous to the case at bar, the Court finds that permitting the plaintiffs to proceed with their ADEA claims would not "wreak havoc with the general scheme of RLA arbitration," *id. at 566, 107 S.Ct. at 1416,* and therefore the RLA does not divest this Court of jurisdiction over the plaintiffs' ADEA claims. Therefore, the motion to dismiss pursuant to Rule 12(b)(1) is denied.[7]

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7. To the extent that any of the defendants base their motion to dismiss for lack of subject matter jurisdiction on Sec. 3(g) of Public Law 102-29, that reliance is misplaced.

> Section 3(g) provides that "[t]here shall be no judicial review of any report or determination of the Special Board under this section." This section thus provides

(Cont'd)

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Given this Court's conclusion that this action is properly within its subject matter jurisdiction, it is now appropriate to address the merits of the claims asserted. This analysis must necessarily begin with a review of the applicable statutory scheme.

B. *The Governing Statutory Framework*

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 provides in relevant part:

> (a) [i]t shall be an unlawful employment practice for an employer —
>
> (1) . . . to discharge any individual, or otherwise to discriminate against any

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(Cont'd)

that the findings of the Special Board are not amenable to judicial review.

While it is true that the plaintiffs seek to challenge the mandatory promotion issue, an issue which certainly was before the Special Board, the plaintiffs are not seeking judicial review of the Special Board's findings. Rather, they are asserting an independent statutory right under the ADEA that happens to be based on the same conduct and facts that form the basis for part of the Special Board's findings. Section 3(g) does not purport to restrict this Court's jurisdiction over a case that is otherwise properly within this Court's federal question jurisdiction under *28 U.S.C. Sec. 1331*. Therefore, this aspect of the defendants' motion to dismiss under Rule 12(b)(1) must also be denied, to the extent that it was asserted.

> individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. Sec. 2000e-2(a)(1) (1988); see also St. Mary's Honor Center v. Hicks, __ U.S. __, __, 113 S.Ct. 2742, 2746, 125 L.Ed.2d 407 (1993). The ADEA, which was enacted subsequent to Title VII, prohibits discrimination on the basis of age. The prohibitory language of the ADEA, which was modelled after the language of Title VII, provides in relevant part:

> (a) [i]t shall be unlawful for an employers
>
> > (1) . . . to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

29 U.S.C. Sec. 623(a)(1) (1988); see also Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158, 165, 109 S.Ct. 2854, 2860, 106 L.Ed.2d 134 (1989).

The Supreme Court has fashioned two separate models whereby an aggrieved individual may seek to redress a claim of discrimination, the disparate treatment and the disparate impact models. The Supreme Court succinctly summarized the differences between these two theories of discrimination in an oft-cited footnote in *International Bhd. of Teamsters v. United States, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977),* stating:

> '[d]isparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical . . .
>
> Claims of disparate treatment may be distinguished from claims that stress 'disparate impact.' The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another . . . Proof of discriminatory motive, we have held, is not required under a disparate-impact theory.

Id. at 335-36 n. 15, 97 S.Ct. at 1854 n. 15 (citations omitted), *quoted with approval in Hazen Paper Company v. Biggins, __ U.S. __, __, __, 113 S.Ct. 1701, 1705-06, 123 L.Ed.2d 338 (1993).*

These models share a common attribute in that they both permit a plaintiff, who alleges that he or she was the victim of some form of discrimination, to avail himself or herself of a presumption of discrimination in the absence of any direct evidence of discrimination. *See Texas Depot of Community Affairs v. Burdine, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207* (1980) (noting that if a plaintiff in a discrimination case can establish a prima facie case of discrimination, then the individual has "in effect create[d] a presumption that the employer unlawfully discriminated against the employee."). The proof that is necessary to avail oneself of this presumption,

however, depends upon which theory of discrimination is being asserted.

1. *The Models of Discrimination*

a. *Disparate Treatment*

In a case predicated on the disparate treatment theory, the plaintiff will often rely on anecdotal evidence in order to show that when "compared with other like-qualified applicants, [he or she] was treated differently *because of* his [protected trait]." *Drake v. City of Fort Collins, 927 F.2d 1156, 1160* (10th Cir.1991) (emphasis added); *see also Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419, 1424* (10th Cir.1993) (citations omitted). Disparate treatment claims, therefore, are in essence claims of intentional discrimination on the basis of an individual's protected trait or status.

i. *The Applicable Case Law Interpretations*

In general, the burden of establishing a prima facie case of intentional discrimination, in the absence of any direct evidence of discrimination, is "not onerous[.]" *Burdine, 450 U.S. at 253, 101 S.Ct. at 1093. It* simply requires the plaintiff to establish that he is a member of a protected class; that he was qualified for a particular job; that he was rejected for that job despite his qualifications; and that the employer continued to seek applications for that position from other persons with the plaintiffs qualifications. *See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973); Martin v. Nannie and the Newborns, Inc., 3 F.3d 1410, 1416-17* (10th Cir.1993); *Drake, 927 F.2d at 1159.*

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The *sina qua non* of a claim of intentional discrimination is proof that the defendant acted with a discriminatory motive or intent. *See Watson v. Ft. Worth Bank & Trust, 487 U.S. 977, 986, 108 S.Ct. 2777, 2784, 101 L.Ed.2d 827 (1988)* (plurality opinion); *Burdine, 450 U.S. at 255, 101 S.Ct. at 1094; Martin, 3 F.3d at 1417.* Thus, a claim of disparate treatment is a claim of intentional discrimination which requires the plaintiff to establish that the employer had a discriminatory animus against the employee because the employee was a member of a class protected under Title VII, and that this animus was a motivating factor for the adverse employment action taken against the employee. *See United States Postal Bd. of Governors v. Aikens, 460 U.S. 711, 715-16, 103 S.Ct. 1478, 1481-82, 75 L.Ed.2d 403* (1983), *quoted in E.E.O.C. v. Flasher Co., Inc., 986 F.2d 1312, 1317* (10th Cir.1992).[8]

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8. If and when the plaintiff establishes a prima facie case of unlawful discrimination, this creates a presumption of unlawful discrimination which, in the absence of any countervailing evidence, would be legally sufficient to permit the trier of fact to conclude that the defendant did in fact impermissibly discriminate against the plaintiff. *See Hicks, __ U.S. at __, __ __ n. 3, 113 S.Ct. at 2747 & 2748-49 n. 3.*

> In most cases, however, the defendant will offer evidence in an effort to rebut the presumption created by the plaintiff's prima facie case because of the obvious consequences of its failure to do so. *See id. __ U.S. at __ - __ n. 3, 113 S.Ct. at 2748-49 n. 3.* In order to rebut the presumption that its actions were discriminatory, the defendant bears the burden of producing evidence that its actions were taken for a legitimate, non-discriminatory reason. *See id., __ U.S. at __, 113 S.Ct. at 2747; Martin, 3 F.3d at 1417.* *Hicks* reaffirmed the position that the defendant's burden is (Cont'd)

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Although the aforementioned cases all involved

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only a burden of production because the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff]" *Burdine, 450 U.S. at* 253, *101 S.Ct. at 1093, quoted in Hicks, __ U.S. at __, 113 S.Ct. at 2747; Faulkner, 3 F.3d at 1425. See generally Director, Office of Workers' Compensation, Dep't of Labor v. Greenwich Collieries, __ U.S. __, __ - __, 114 S.Ct. 2251, 2254-2257, 129 L.Ed.2d 221* (1994) (discussing the differences between burdens of production and burdens of persuasion).

Once the defendant produces a nondiscriminatory reason for its actions, then "[t]he presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture." *Hicks, __ U.S. at __, 113 S.Ct. at 2749.* At that time, the plaintiff will have the opportunity to attempt to show that the defendant's proffered reason or reasons are untrue and that they are merely a pretext for discrimination. *See Burdine, 450 U.S. at* 253, 255 *n. 10, 101 S.Ct. at 1093, 1095 n. 10; Watson, 487 U.S. at 986, 108 S.Ct. at* 2784. As the Tenth Circuit recently noted, the plaintiff must demonstrate that the defendant's reasons are:

a pretext for *discrimination against a protected class.* A pretextual reason may be advanced to conceal a wide range of possible motivations, but Title VII only reaches pretextual cases where the advanced reason is shown to be a pretext for a discriminatory animus based upon a person's protected status.

Flasher, 986 F.2d at 1321 (citation omitted).

(Cont'd)

interpretations of Title VII, the Supreme Court has unequivocally held that the language of the ADEA expressly encompasses disparate treatment claims. See *Biggins, __U.S. at __, 113 S.Ct. at 1706* (noting that the ADEA prohibits discrimination (because off an individual's age); *id.* (noting that disparate treatment claims "captured[ ]the essence of what Congress sought to prohibit in the ADEA"). It is therefore unexceptional that disparate treatment claims may be asserted under the ADEA. *Id.* This conclusion is due, at least in part, to the fact that the prohibition in the ADEA against discrimination "because oft an individual's age was taken *in haec verba* from the language in Title VII prohibiting discrimination Because oft an individual's race, color, religion, sex or national origin. *See Oscar Meyer & Co. v. Evans,* 441 U.S. *750, 755, 99 S.Ct. 2066, 2071, 60 L.Ed.2d 609* (1979); *Lorillard v. Pons, 434 U.S. 575, 584, 98 S.Ct. 866, 872, 55 L.Ed.2d 40* (1978) (footnote omitted).

Moreover, this view is entirely consistent with the position adopted by the Tenth Circuit, which has held that "[t]he framework for assessing evidence in an age discrimination case parallels that applicable in a Title VII case." *Spulak v. K Mart Corp., 894 F.2d 1150, 1153* (10th Cir.1990) (disparate treatment claim under the ADEA); *see also E.E.O.C. v. Sperry Corp., 852 F.2d 503, 507* (10th Cir.1988) ("Courts regularly adapt the framework developed in Title VII cases ... to individual

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(Cont'd)

> Once the plaintiff's rebuttal evidence has been introduced, the finder of fact will have all of the evidence before it which is necessary to decide the ultimate question of whether the defendant intentionally discriminated against the plaintiff "because of" his or her protected status. *See Hicks, __ U.S. at __, 113 S.Ct. at* 2749.

disparate treatment claims under ADEA") (citation omitted); *Merrick v. Northern Natural Gas Co., 911 F.2d 426, 429* (10th Cir.1990); *see also Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 529* (10th Cir.1994); *Faulkner, 3 F.3d at 1424*; *id. at n. 2* (citing *MacDonald v. Eastern Wyoming Mental Health Center, 941 F.2d 1115, 1119* (10th Cir.1991); *Denison v. Swaco Geolograph Co., 941 F.2d 1416, 1420* (10th Cir.1991)). As a result, there can be no doubt that a disparate treatment claim is in fact cognizable under the ADEA. The question before the Court in this case thus becomes one of determining whether this claim may be maintained under the facts of this case.

ii. *Application to the Case at Bar*

The defendants make two arguments in support of their motion for summary judgment: (1) the plaintiffs have failed to establish a prima facie case of intentional discrimination on the basis of age;[9] and (2) the plaintiffs have failed to carry their

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9. As noted above, a plaintiff may avail himself of a presumption of discrimination by establishing a prima facie case of intentional discrimination. In order to establish this presumption, the plaintiff must show: (1) that he is within the protected age group (that he is over 40 years old); (2) that he was qualified for a particular position with the defendant; (3) that he was adversely affected by some decision or action of the defendant; and (4) that the defendant ultimately hired a person younger than the plaintiff. *See, e.g., Faulkner, 3 F.3d at 1425 n. 3; accord St. Mary's Honor Center, __ U.S. at __, 113 S.Ct. at 2747* (Title VII case).

> In this case, the defendants argue that the plaintiffs were not qualified to serve as conductors when they were brakemen because they had not successfully passed an examination which was a necessary prerequisite to becoming a conductor. For reasons stated below, however, the Court need not resolve this issue since it is irrelevant.

burden of establishing that there is a genuine issue of material fact with respect to whether their proffered non-discriminatory reasons were pretextual.

The validity *vel non* of the defendants' argument that the plaintiffs have failed to establish a prima fade case of intentional discrimination is irrelevant. It is well-settled that the *McDonnell Douglas* and *Burdine* burdens of proof are nothing more than "a means of arranging the presentation of evidence" in discrimination suits, *see Hicks, __ U.S. at __ n. 3, 113 S.Ct. at 2749 n. 3* (citing *Watson, 487 U.S. at 986, 108 S.Ct. at 2784*), and that as such, they should not "be applied rigidly." *Cone, 14 F.3d at 530* (citations omitted). Rather, the burdens of proof must be viewed with an understanding of their purpose, which is nothing more than a framework for the orderly presentation of proof in an employment discrimination lawsuit. *See Burdine, 450 U.S. at 255 n.* 8, *101 S.Ct. at 1094 n.* 8 (stating that the aim of the burdens of proof is to "sharpen[ ] the inquiry into the elusive factual question of intentional discrimination."); *see also Hicks, __ U.S. at __, 113 S.Ct. at 2746* (stating that the burdens of proof were designed to establish "an order for the presentation of proof in ... discriminatory treatment cases.") (footnote omitted).

It follows from this that if the defendant has come forward and produced evidence of a legitimate, non-discriminatory reason for its actions, then "the *McDonnell Douglas* framework with its presumptions and burdens — *is no longer relevant.*" *Hicks, __ U.S. at __, 113 S.Ct. at 2749* (emphasis added). Once the defendant meets its burden of production, then the presumption of discrimination created by the plaintiff's prima facie case "ha[s] fulfilled its role of forcing the defendant to come forward with some response" and accordingly, it simply drops out

of the picture."[10] *Id.* After the defendant has asserted its reasons, then the plaintiff is entitled to an opportunity to show that those reasons are in fact a pretext for discrimination regardless of whether he may have established a prima facie case in the first instance. *See Cone, 14 F.3d at 530.*

It is undisputed in this case that the defendant has in fact proffered a legitimate, nondiscriminatory reason for its actions, namely, compliance with a congressional mandate. As a result,

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10. While it is true that *Hicks* was a case involving review of the trial court's findings of fact and conclusions of law after a bench trial, whereas this case involves a motion for summary judgment, there is no valid reason for confining this portion of *Hicks* to cases at the summary judgment phase. Moreover, the Tenth Circuit has seemingly endorsed this view, albeit in an unpublished order and judgment. *See Card v. Hercules, Inc., No.* 92-4169, 1993 WL 351337, *2, 1993 U.S.App. LEXIS 21631, *5 (10th Cir. Aug. 19, 1993).

> While the Court is cognizant that citation to unpublished orders and judgments is "not favored," a standing order of the Tenth Circuit permits citation of these decisions when they have "persuasive value with respect to a material issue in a case and would assist the court in its dispositions *See In re Citation of Unpublished Opinions/Orders and Judgments, 151 F.R.D.* 470 (10th Cir.1993) (*en banc*). Because of the relative recency of the *Hicks* decision, and the corresponding lack of published decisions in this circuit interpreting the parameters of that case, the Court finds that reliance on *Card is* useful for its persuasive value on the issue of whether the reasoning of *Hicks* applies to a motion for summary judgment. As a result, the Court finds that whether the plaintiffs have established a prima facie case is irrelevant since the defendant has come forward and offered nondiscriminatory reasons for its actions.

the question of whether the plaintiffs have established a prima facie case is no longer relevant in this case; the real issue is whether the plaintiff has shown that there is "enough evidence to support an inference that the employer's reason was merely a pretext[.]" *Id.* The plaintiff bears the burden of proving more than just that the asserted reasons were pretextual; those reasons must be a pretext *for unlawful discrimination against a member of a protected class. See Flasher, 986 F.2d at 1321* (emphasis added).

"To defeat a summary judgment motion, [the plaintiff] would have to simply point to *evidence* establishing a reasonable inference that the employer's proffered explanation is unworthy of credence." *Id.* (citing *MacDonald, 941 F.2d at 1121-22* (emphasis added). The emphasis on the word "evidence" reinforces the fact that if the nonmoving party fails to demonstrate that there is evidence that creates a genuine issue of material fact on an "element essential to that party's case, and on which that party will bear the burden of proof at trial," then summary judgment is appropriate. *See Celotex, 477 U.S. at 322, 106 S.Ct. at 2552; see also O'Driscoll v. Hercules, Inc., 12 F.3d 176, 179* (10th Cir.1994). "[A]llegations alone will not defeat summary judgment." *Cone, 14 F.3d at 530* (citing *Celotex, 477 U.S. at 322, 106 S.Ct. at 2552); see also* FED.R.CIV.P. 56(e) (noting that a party may not defeat an otherwise properly supported motion for summary judgment by "rest[ing] upon the mere allegations [in their pleadings] . . . but [they] must set forth specific facts showing that there is a genuine issue for trial."); *Denhardt, 836 F.Supp. at 798* ("The non-moving party is now put to their proof.").

After a careful review of the record, the Court finds that the plaintiffs have failed to offer any evidence that would permit a rational trier of fact to conclude that the defendants' actions were

a pretext for intentional and unlawful discrimination on the basis of age. In opposing the defendants' motion for summary judgment, the plaintiffs have filed numerous affidavits pursuant to Rule 56(e). Aside from being conclusory and duplicative,[11] the affidavits do not contain any facts which would permit a reasonable trier of fact to find that the defendants' actions were motivated by a discriminatory animus with respect to the plaintiffs' ages.[12] The fact that the affidavits state that "[t]he railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age" does not change the conclusion that there is no evidence of *intentional* discrimination necessary to support a disparate treatment claim. Moreover, not only do the affidavits not contain any factual basis for the assertion that the defendants impermissible acted on the basis of the plaintiffs' age, they do not contain any allegations that would even support an inference of intentional discrimination. Additionally, the conclusory allegations in the complaints filed in these cases cannot be relied on to defeat the defendants' motions for summary judgment.

Even viewing the evidence in the light most favorable to the plaintiffs, the Court finds that there is an absence of any credible evidence to rebut the defendants' proffered reason for its employment actions. As the Eleventh Circuit stated:

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11. Nearly all of the forty or so affidavits submitted contain the exact same "boilerplate" language. The only difference is that each one is signed by a different affiant.

12. "[Discriminatory] intent means doing something because of, not in spite of, a particular consequence." *Mett v. Transit Mix, Inc., 828 F.2d 1202, 1216 (7th* Cir. 1987) (Easterbrook, J., dissenting) (citing *Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870* (1979)).

> [a] plaintiff when faced with a motion for summary judgment cannot rely on attenuated possibilities that a jury would infer a discriminatory motive, but rather must come forward with sufficient evidence to ... respond sufficiently to any rebuttal by the defendant to create a genuine issue of material fact. Even where a prima facie case has been established but the defendant has rebutted with a proffer of a legitimate, non-discriminatory reasons for the discharge, *a genuine issue of material fact is not automatically created.*

Pace v. Southern Ry. Sys., 701 F.2d 1383, 1391 (11th Cir.) (emphasis added), *cert. denied, 464 U.S. 1018, 104 S.Ct. 549, 78 L.Ed.2d 724* (1983), *quoted in Matson v. Cargill, Inc., 618 F.Supp. 278, 281* (D.Minn.1985). The Matson court then stated that "if the plaintiff cannot produce sufficient evidence to create an inference of discriminatory motive, then the employer's articulated business reasons remain unrebutted, and summary judgment is appropriate." *Matson,* 618 *F.Supp. at 281-82* (citing *Steckl v. Motorola, Inc., 703 F.2d 392* (9th Cir.1983)).

Based on the plaintiffs' failure to carry their burden of showing that the defendants' actions were a pretext for intentional discrimination, summary judgment is warranted on the disparate treatment claim. *See, e.g., Branson v. Price River Coal Co.,* 853 F.2d 768, 771 (10th Cir.1988) (affirming district court's grant of summary judgment on the grounds that plaintiffs failed to present any credible evidence on the issue of pretext" and finding that their subjective "mere conjecture" was insufficient); *accord MacDonald, 941 F.2d at 1118.*

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Having resolved the plaintiffs' disparate treatment claim, the Court will now consider the defendants' motion with respect to the plaintiffs' disparate impact claim.

b. *The Disparate Impact Model*

While it is clear that disparate treatment involves "the most easily understood type of discrimination," *Teamsters, 431 U.S. at 335 n. 15, 97 S.Ct. at 1854 n. 15, quoted in Watson, 487 U.S. at 986, 108 S.Ct. at 2784,* the Supreme Court's landmark decision in *Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158* (1971) recognized a second, alternative theory of discrimination, the so-called disparate impact model. The Court stated that it was necessary to allow a claim premised on the disparate impact theory in order to further the congressional purposes behind Title VII of "achiev[ing] equality of employment opportunities and removing the kind of "artificial, arbitrary, and unnecessary barriers to employment" and stereotypes that operated in the past to disadvantage particular groups of individuals. *Id. at 429-31, 91 S.Ct. at 852-54.*

A disparate impact claim alleges that an otherwise facially neutral, non-discriminatory employment practice nonetheless has significant adverse effects on protected groups, even in the absence of any proof that the employer adopted the practice with a discriminatory motive or intent. *Id. 487 U.S. at 986-87, 108 S.Ct. at 2784-85; see also Faulkner, 3 F.3d* at *1428; Ortega v. Safeway Stores, Inc., 943 F.2d 1230, 1243* (10th Cir.1991). "To establish a prima facie case of disparate impact discrimination, plaintiffs must show that a specific identifiable employment practice or policy caused a significant disparate impact on a protected group." *Wards Cove Packing Co. v. Atonio, 490 U.S.*

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642, 656, 109 S.Ct. 2115, 2124, 104 L.Ed.2d 733 (1989),[13] *quoted in Faulkner,* 3 F.3d at 1428; *see also Murphy v. Derwinski, 990 F.2d 540, 544* (10th Cir.1993).[14]

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13. While portions of the *Wards Cove Packing* decision dealing with the burdens of proof in a disparate impact case were expressly overturned by Congress in the 1991 amendments to the Civil Rights Act, *see 42 U.S.C. Sec. 2000e-2*(k)(1)(A) (West Supp.1994), that case is still valid authority for its recitation of the elements of a disparate impact claim.

14. If the plaintiffs' evidence establishes a prima facie case of disparate impact discrimination, then under the law as set forth in the *Wards Cove Packing* decision, "the employer carries the burden producing evidence of a business justification for his employment practice. *The burden of persuasion, however, remains with the disparate-impact plaintiff." Wards Cove Packing, 490 U.S. at 659, 109* S.Ct. *at 2126* (emphasis added). This holding is entirely consistent with the Supreme Court's decisions interpreting the burdens of proof in disparate treatment cases. *E.g., St. Mary's Honor Center, __ U.S. at __, 113* S.Ct. *at 2749.* Indeed, Justice White's opinion in *Wards Cove Packing* relied on *Watson,* a disparate treatment case, in support of the quotation above. *See id.*

> In its legislative response to *Wards Cove Packing,* however, Congress expressly rejected the italicized language above and reallocated the burden of persuasion with respect to the business justification defense in a disparate impact case to the defendant. *See 42 U.S.C. Sec. 2000e-2(k)(1)(A)(i).* Under that statute, the defendant bears the burden of proving that the employment practice "is job related for the position in question and consistent with business necessity[.]" *See 42 U.S.C. Sec. 2000e-2* (k)(l)(A); *see also Wards* Cove *Packing, 490 U.S. at* 658, *109 S.Ct. at 2125*; *Watson, 487 U.S. at* 998, *108* S.Ct. *at* 2790; *Faulkner, 3 F.3d at 1428-30.*
>
> The view that Congress changed this aspect of the

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i. *Title VII*

"[T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Watson*, 487 U.S. *at 987, 108 S.Ct. at* 2785, *quoted in Faulkner*, 3 F.3d *at* 1428. Unlike the disparate treatment model, which challenges particular adverse employment *actions*, the disparate impact approach permits an employee to challenge particular employment *practices* which, although facially neutral, have the practical

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burdens of proof set out in *Wards Cove Packing* was the one espoused by the Ninth Circuit in its subsequent *Wards Cove Packing* opinion on remand from the Supreme Court. *See Atonio v. Wards Cove Packing Co., 10 F.3d 1485, 1491* (9th Cir.1993) (stating that the 1991 amendments "placed[ ] on the employer the burden of proving that a practice causing a disparate impact is job related for the position in question and consistent with business necessity") (internal quotations omitted).

Finally, analogous to disparate treatment cases, once the defendant offers evidence in support of its defense, the plaintiff is entitled to an opportunity to prove a pretext by the employs by "persuad[ing] the factfinder that 'other tests or selection devices, without a similarly undesirable [effect on the protected class] would also serve the employees legitimate [hiring] interest[s]' " *Moody, 422 U.S. at 425, 95 S.Ct. at 2375, quoted in Faulkner*, 3 F.3d *at* 1429 (footnote omitted).

effect[15] of disproportionately bearing on members of a protected class. *See Watson*, 487 *U.S. at 987-88, 108 S.Ct. at 2784-86.*

The method of proof employed for establishing a presumption of discrimination in disparate impact cases "usually focuses on statistical disparities, rather than specific incidents [of misconduct.]" *Watson*, 487 *U.S. at* 987, *108 S.Ct. at 2785.* Examples of employment practices that, in certain instances, have been held to have a disparate impact include standardized employment tests such as written aptitude tests, *see Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280* (1975) (disparate impact based on race), written tests of verbal skills, *see Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597* (1976) (same) and height and weight requirements, *see Dothard v. Rawlinson, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786* (1977) (disparate impact based on gender).

In order to understand fully the issue of whether the disparate impact theory of discrimination enunciated in *Griggs* should be incorporated into the ADEA, it is useful to review the historical basis behind the *Griggs* decision and the disparate impact theory.

After Title VII took effect in July of *1965*, it was clear that overt discrimination on the basis of the protected traits embodied in that statute was prohibited.[16] In *Griggs*, the Court unanimously

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15. As Judge Easterbrook noted, a more accurate description of this model would use the phrase "disparate effect" rather than "disparate impact." Nonetheless, the latter is used since it is the established convention. See *Metz, 828 F.2d at 1214* (Easterbrook, J., dissenting).

16. Prior to the enactment of Title VII, employers openly discriminated against individuals based on negative stereotypes regarding, *inter alia*, gender and race. *See Griggs, 401 U.S. at 427-28, 91 S.Ct. at 851-52* (noting the history of overt discrimination by Duke Power prior to 1965).

recognized that if Title VII was interpreted to prohibit only overt intentional discrimination, then employers could effectively circumvent this prohibition through the back door by enacting facially non-discriminatory measures that had the practical effect of discriminating against the same groups of individuals. In the Supreme Court's words, employers would be free to enact facially neutral "practices, procedures, or tests" in an effort to " 'freeze' the status quo of prior discriminatory employment practices." *Id. 401 U.S. at 430, 91 S.Ct. at 853.* Thus, these purportedly neutral practices would have the functional effect of perpetuating the history of societal discrimination against these groups of individuals. Specifically, the Court found a nexus between the history of societal discrimination and the lower test scores registered by African Americans. *See id. at 430, 91 S.Ct. at 853* (stating that the lower test scores "would appear to be directly traceable to race.").

For example, the practice that was condemned in *Griggs* was a requirement that employees successfully pass two different aptitude tests and possess an high school diploma before they could be eligible for inter-company transfers. *Id. at 427-29, 91 S.Ct. at 851-53.* The Court struck down the employment practice on the ground that those requirements would tend to perpetuate the history of past discrimination against African-Americans, and thus freeze the existing discriminatory composition of the defendants' work force. The *Griggs* Court cited *Gaston County v. United States, 395 U.S. 285, 89 S.Ct. 1720, 23 L.Ed.2d 309* (1969) in support of the unfortunate, but well-known, fact that Negroes "have long received inferior education in segregated schools[.]" *Griggs, 401 U.S. at 430, 91 S.Ct. at 853.* Two years later, in *McDonnell Douglas,* Justice Powell, writing for the Court, reiterated that:

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> *Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives.

McDonnell Douglas, 411 U.S. at 806, 93 S.Ct. at 1826. Viewed in context, then, it is clear that *Griggs'* adoption of the disparate impact theory was grounded in the fear of allowing employers' work forces to remain stagnant and discriminatory in composition with respect to certain groups of individuals when that group of individuals has been subjected to an empirically documented history of overt societal discrimination based on factors beyond their control. In order to prevent employers from circumventing the broadly phrased congressional prohibition contained in Title VII, the *Griggs* Court adopted the disparate impact theory.

It is with this understanding of the underpinnings of the disparate impact doctrine that this Court must now decide the question of whether, in the words of Justice Stevens, it is "[ ] appropriate simply to transplant [Title VII] standards in their entirety into a different statutory scheme having a different history." *Davis, 426 U.S. at 255, 96 S.Ct. at 2054* (Stevens, J., concurring).

ii. *The ADEA*

Neither the Supreme Court, *see Biggins, __ U.S. at __ 113 S.Ct. at 1706* (citing *Markham v. Geller, 451 U.S. 945, 101 S.Ct. 2028, 68 L.Ed.2d 332* (1981) (Rehnquist, J., dissenting from the denial of certiorari)); *id. __ U.S. at __, 113 S.Ct. at 1710*

(Kennedy, J., concurring), nor the Tenth Circuit, *see Faulkner, 3 F.3d at 1428* (assuming the applicability of disparate impact under the ADEA without deciding the issue) (citations omitted), has ever held[17] that the disparate impact theory of discrimination is cognizable under the ADEA. Moreover, all of the other federal circuit courts of appeals that have considered this issue have either assumed that the disparate impact doctrine applies under the ADEA, or have concluded that it applies without any formal analysis of the issue. *See, e.g., Fisher v. Transco Services-Milwaukee, Inc., 979 F.2d 1239, 124445 & n.* 3 (7th

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17. To be sure, in *Heward v. Western Elec. Co., Inc.*, 35 Fair Empl.Prac.Cas. (BNA) 807 (10th Cir.1984), the Tenth Circuit did "recogni[ze] that a plaintiff may bring a cause of action under the ADEA under either the disparate treatment or the disparate impact theory of recovery." In support of this proposition, the court cited *McDonnell Douglas* and *Griggs*, both of which were Title VII cases, along with its earlier decision in *Schwager v. Sun Oil Co. of Pennsylvania, 591 F.2d 58* (10th Cir.1979), an ADEA disparate treatment case.

> There are, however,, at least two reasons why Heward cannot be considered as an authoritative precedent on this question of law. First, in footnote five, which immediately follows the sentence quoted above, the court of appeals expressly stated that "[t]he record is replete with Heward's acknowledgements that his cause of action was based on disparate treatment analysis rather than disparate impact analysis." Thus, the statement quoted above is, at best, classic obiter dicta. Second, one of the most recent decisions from the Tenth Circuit involving this issue expressly states that it has never been "directly addressed" in this Circuit. *See Faulkner, 3 F.3d at 1428.* Thus, the Tenth Circuit itself apparently does not regard the Heward decision as authoritative. As a result, it is clear to this Court that this issue is one of first impression within this circuit.

Cir.1992) (noting that prior Seventh Circuit precedent has only "assumed" that disparate impact is available under the ADEA); *E.E.O.C. v. Westinghouse Elec. Corp., 925 F.2d 619, 627* (3d Cir.1991); *MacPherson v. University of Montevallo, 922 F.2d 766, 770-71* (11th Cir.1991); *Abbott v. Federal Forge, Inc., 912 F.2d* 867 (6th Cir.1990); *Rose v. Wells Fargo & Co., 902 F.2d 1417, 1420-21* (9thCir.1990); *Leftwich v. Harris Stowe State College, 702 F.2d 686, 690-91* (8th Cir.1983); *Geller v. Markham, 635 F.2d 1027, 1032* (2d Cir.1980), *cert. denied, 451 U.S. 945, 101 S.Ct. 2028,* 68 *L.Ed.2d* 332 (1981).[18] *But see Martincic v. Urban Redevelopment Auth., 844 F.Supp. 1073, 1076-78* (W.D.Pa.1994) (concluding that the disparate impact theory was unavailable under the ADEA).

It is thus apparent that this case squarely presents this Court with a significant issue of first impression within this circuit on the question of whether it is proper to apply the disparate impact theory of discrimination to age discrimination cases. At a minimum, this formidable task requires this Court to give this issue an appropriate level of attention and scrutiny. As one court stated, "[t]hat the [ADEA] is embodied in a separate act and has its own unique history at least counsel the examiner to consider the particular problems sought to be reached by the statute." *Laugesen v. Anaconda Co.*, 510 F.2d 307, 312 (6th Cir.1975). For reasons expounded on below, this Court concludes that it is inappropriate to incorporate the disparate impact theory of

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18. In subsequent cases, the Second Circuit has adhered to its decision in *Geller*, which is generally credited as the first decision to declare the applicability of the disparate impact doctrine under the ADEA. *See, e.g., Maresco v. Evans Chemetics, 964 F.2d 106, 115* (2d Cir.1992); *Bay v. Times Mirror Magazines, Inc., 936 F.2d 112, 117* (2d Cir.1991); *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1369 (2d Cir.1989), *cert. denied, 494 U.S. 1026, 110 S.Ct. 1470, 108 L.Ed.2d 608* (1990).

discrimination enumerated in *Griggs* into the ADEA, and as a result, the defendants' motion for summary judgment is warranted on this claim.

1. *Language of the ADEA*

The defendants' initial argument rests on a comparison of the language of Title VII and that of the ADEA. Many of these arguments were first set forth in an oft-cited law review note. *See* Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan.L.Rev. 837 (1982), *cited in, e.g., Biggins*, __ *U.S. at* __, *113 S.Ct. at 1710* (Kennedy, J., concurring). This portion of the defendants' argument is premised on a literal reading of the statutory language of the ADEA, portions of which the Supreme Court has stated are similar to the language of Title VII. *See Evans, 441 U.S. at 755, 99 S.Ct. at 2071; Lorillard, 434 U.S. at 584, 98 S.Ct. at* 872 (footnote omitted).

There are two components to this argument. The first is whether disparate impact claims are cognizable under the ADEA. The second is whether such claims are in fact prohibited by the ADEA. As to the former, the defendants' argument rests on the "because of" language of the ADEA and asserts that this language only authorizes disparate treatment claims. It is apparent, however, that this argument does not hold water since Title VII, like the ADEA, only prohibits discrimination "because of" an individual's protected status, yet disparate impact claims are recognized under Title VII. Therefore, this argument cannot support the defendant's position.

The second aspect of this argument relies on pieces of statutory text which are found in the ADEA but which lack a parallel provision in Title VII. Section 623(f)(1) of the ADEA permits an employer to defend a claim of age discrimination on

the grounds that any differential treatment was "based on reasonable factors other than age." *29 U.S.C. Sec. 623(f)(1).* Relying on this language, the defendants argue that the ADEA actually prohibits disparate impact claims since the alleged employment practice sought to be challenged would constitute a reasonable factor other than age. It is at least arguable, however, that the modifier "reasonable" could be interpreted within the scheme of a disparate impact claim as encapsulating the defenses of business necessity and job relatedness; that is, a factor other than age which nonetheless has a disparate impact based on age is a defense to such a claim if it is "reasonable" (i.e., is related to the position in question). Therefore, the Court is not persuaded by this argument. As a result, it will be necessary to look beyond the plain language of the statute. *Cf. Robin v. United States, 449 U.S. 424, 430, 101 S.Ct. 698, 701, 66 L.Ed.2d 633* (1981).

2. *The 1991 Amendments to the Civil Rights Act*

The defendants' second argument is that when Congress codified the principles of the disparate impact theory of discrimination in the 1991 amendments to Title VII of the Civil Rights Act of 1964, *see 42 U.S.C. Sec. 2000e-2(k)(1)(A)* (West Supp.1994), the failure to codify this principle under the ADEA constitutes an implied rejection of the doctrine's applicability under the ADEA.[19] The defendants' bolster their argument by

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19. In codifying the disparate impact theory, it is clear that Congress intended to overrule expressly the portion of the Supreme Court's decision in *Wards Cove Packing* which dealt with the burdens of production and persuasion in a disparate impact case. *See* Civil Rights Act of 1991, Pub.L. No. 102-166, 105 Stat. 1071.

Section 2(2) of the "Findings" section of that law states

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noting that Congress did in fact amend certain portions of the ADEA as part of the 1991 amendments;[20] thus, they assert that Congress' failure to include the codification of the disparate impact theory under the ADEA was a conscious omission which supports their position that the disparate impact theory is inapplicable to claims under the ADEA.

While this reasoning arguably has some appeal, the Supreme Court has repeatedly cautioned the lower courts as to the dangers inherent in attempting to infer some affirmative intention from congressional silence or inaction. *E.g., Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 306, 108 S.Ct. 1145, 1153, 99 L.Ed.2d 316* (1988), citing *Red Lion Broadcasting Co. v. Federal Communications Comm'n, 395 U.S. 367, 381 n. 11, 89 S.Ct. 1794, 1802 n. 11, 23 L.Ed.2d 371 (1969), American Trucking Ass'ns, Inc. v. Atchison, T. & S.F. Ry. Co., 387 U.S. 397, 416-18, 87 S.Ct. 1608, 1618-20, 18 L.Ed.2d 847* (1967).

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that "the decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d* 733 (1989) has weakened the scope and festiveness of Federal civil rights protections[.]" Section 3(2) of the "Purposes" section of that law states that the amendments were intended "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in . . . decisions prior to *Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733* (1989)[.]" Thus, it is readily apparent that the *Wards Cove Packing* decision, a Title VII case, was one of the primary purposes motivating Congress to enact the 1991 amendments to the Civil Rights Act of 1964.

20. *See* 29 U.S.C. Sec. 626(e)-(f) (West Supp. 1994).

This admonition, however, is not an absolute prohibition against the use of congressional inaction. At least one federal district court has relied, in part, on this principle in support of its conclusion that the disparate impact theory is unavailable to claims brought under the ADEA. *See Martincic, 844 F.Supp. at 1076-78.*[21] With all due respect to that court, this Court believes that a more prudent approach would refrain from attempting to draw an inference from inaction. This Court is wary of undertaking the task of imputing action to a co-equal branch of government from the latter's inaction.

There are, moreover, various reasons why Congress may not have codified the disparate impact theory under the ADEA, not the least of which is that it may have been more concerned with overturning the Supreme Court's existing Title VII jurisprudence.[22] More specifically, with respect to disparate

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21. In the words of the *Martincic* court:

> Congress' recent decision to include disparate impact in Title VII claims based on race, color, religion, sex, and national origin, but not to suggest disparate impact analysis for age in the ADEA, or elsewhere, *was not an oversight.*

Martincic, 844 F.Supp. at 1078 (emphasis added).

22. It is noteworthy that in section 3(4) of the "Purposes" behind the 1991 amendments to the Civil Rights Act, Congress stated its desire "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination."

> Thus, there can be little doubt that the overriding aim of the 1991 amendments to the Civil Rights Act of 1964

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impact claims, Congress may have been preoccupied with overturning the *Wards Cove Packing* decision, a Title VII case, and not the particular arguments for and against extending the disparate impact doctrine to age discrimination claims under the ADEA. In short, Congress simply may not have given adequate consideration to the issue of whether the disparate impact doctrine should be extended to the ADEA. For this reason alone, this Court believes that little, if any, weight should be attributed to congressional inaction in this context.

3. *The Policies Behind the* Griggs *Decision*

The defendants' third and final basis for asserting that the disparate impact theory is inapplicable under the ADEA goes to the issue of whether the purposes and policies that underlie the *Griggs* decision are germane and applicable to a claim under the ADEA. For reasons given below, the Court finds that they are not.

It is accurate to say that "[t]he concept of perpetuating past discrimination [was] central to the *Griggs* rationale." *See* Note, 34 Stan.L.Rev. at 848. Although *Griggs* was a Title VII case

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(Cont'd)

> was a legislative response to the most recent Supreme Court decisions interpreting the civil rights laws. Significantly, most of the decisions which Congress chose to respond to were decided under Title VII and *not* the ADEA. *See, e.g., Wards Cove Packing, 490 U.S. 642, 109 S.Ct. 2115; Martin v. Wilks, 490 U.S. 755, 109* S.Ct. *2180, 104 L.Ed.2d 835* (1989); *Price Waterhouse v. Hopkins, 490 U.S. 228, 109* S.Ct. *1775, 104* L.Ed.2d *268* (1989); *Watson, 487 U.S. 977, 108 S.Ct. 2777;* cf. *Patterson v. McLean Credit Union, 491 U.S. 164, 109 S.Ct.* 2363, *105* L.Ed.2d 132 (1989) (interpreting *42 U.S.C. Sec. 1981).*

involving racial discrimination, the Supreme Court relied on that decision and its decision in *Moody*, another race discrimination case, in applying the disparate impact theory to a claim of gender discrimination. *See Dothard, 433 U.S. at 329, 97 S.Ct. at 2726* (citing *Griggs, 401 U.S. 424, 91 S.Ct. 849; Moody, 422 U.S. 405, 95 S.Ct. 2362*, and noting that the reasoning employed in those cases "guide[s] our approach here."). The *Dothard* Court did not analyze the policies that buttressed the *Griggs* decision in implicitly approving of the availability of a disparate impact claim based on gender, and such claims are now generally accepted.[23] *E. g., Murphy, 990 F.2d at 544.*

The ADEA, however, protects against discrimination on the basis of age. While *Griggs* was rightly concerned with eliminating arbitrary barriers to employment on the basis of stereotypes that were not relevant to an individual's ability to perform a job, there is, at some level, a degree of correlation between age and ability. More importantly for present purposes, however, is the fact that this correlation cannot be traced to a history of past discrimination against these particular individuals

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23. Disparate impact claims based on national origin and religion appear in the reported cases. *See, e.g., Cota v. Tucson Police Dep't*, 783 *F.Supp. 458, 471-74* (D.Ariz.1992) (national origin); *Tagatz v. Marquette Univ., 681 F.Supp. 1344, 1357-59* (E.D.Wis.1988) (religion). *But cf. E.E.O.C. v. Sambo's of Georgia, Inc., 530 F.Supp. 86, 92-93* (N.D.Ga.1981) (finding that the disparate impact theory was unavailable to challenge a practice allegingly burdening individuals because of their religion based on the definition of religion contained in *42 U.S.C. Sec. 2000e-2(j)*). This Court was unable to find any reported decisions alleging discrimination on the basis of "color."

> Nonetheless, it is clear that the primary traits for which disparate impact claims are asserted are race and gender.

who were previously younger and possibly the beneficiaries of any age discrimination. In *Griggs*, the critical fact was the link between the history of educational discrimination and the use of that discrimination as a means of presently disadvantaging African-Americans. These concerns simply are not present when the alleged disparate impact is based on age.

This conclusion is further reinforced by the fact that the Supreme Court itself has expressly declined to equate the degree of prior discrimination against older workers with the level of discrimination against African-Americans. In *Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520* (1976) (*per curiam*), the Supreme Court held that a Massachusetts statute establishing a mandatory retirement age of fifty for police officers did not amount to discrimination against a suspect class for purposes of the equal protection clause of the Fourteenth Amendment. As a result, the statute was only subjected to rational basis review and was thus upheld. *Id. at 312, 96 S.Ct. at 2566.* In so holding, the Court made several observations which are relevant to the case at bar.

> While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminate against on the basis of race or national origin, *have not experienced a history of purposeful unequal treatment or been subjected to unique disabilities on the basis of sterotyped characteristics not truly indicative of their abilities.*

Id. at 313, 96 S.Ct. at 2567 (emphasis added). Thus, while recognizing that the level of discrimination against the elderly

was not the same as that against African-Americans, the *Murgia* Court also recognized that age is often a relevant indicator of job performance and is not a completely inapposite stereotype with no correlation to job performance.

When these teachings are viewed in conjunction with the fact that an employer's current employment practices cannot be said to *perpetuate* past discrimination against a particular group of older workers — since age is a mutable characteristic — which was a central factor in *Griggs*, it is apparent that the underpinnings of *Griggs* simply have no application when the alleged discrimination is based on age. Phrased alternatively, an employment practice which disproportionately falls on older individuals, standing alone, should not be said to give rise to an inference or a presumption of unlawful discrimination on the basis of age. Accordingly, based on this Court's conclusion that the plaintiffs' disparate impact claims are not cognizable under the ADEA as a matter of law, the defendants' motion for summary judgment is warranted.

THEREFORE, it is

ORDERED that the Defendants' Motions to Dismiss for Lack of Subject Matter Jurisdiction be, and the same hereby are, DENIED. It is further

ORDERED that the Defendants' Motions for Summary Judgment be, and the same hereby are, GRANTED.

APPENDIX C — DETERMINATION OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, DALLAS DISTRICT OFFICE DATED APRIL 19, 1993

UNITED STATES EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Dallas District Office

207 S. Houston Street
Dallas, TX 75202-4726
PH: (214) 655-355
TDD (214) 655-3363
FAX (214) 655-3443

CHARGE No. 320 92 1860 & 320 92 1861

Earl J. Vance
1421 N. 79
Lincoln, Nebraska 68505

CHARGING PARTY

Burlington Northern Railroad
Continental Plaza
777 Main Street
Ft. Worth, TX 76102

&

United Transportation Union
14600 Detroit Avenue
Cleveland, Ohio 44107

RESPONDENT

Appendix C

DETERMINATION

Under the authority vested in me by the Commission, I issue the following determination as to the merits of the subject charge filed under the Age Discrimination in Employment Act (ADEA) of 1967, as amended.

All requirements for coverage have been met. Charging Party alleged that he and members of his class were discriminated against in violation of the ADEA because of age. Summarily, the charge alleged that Brakemen have been discriminated against because of their age since the majority of Brakemen are over age 40.

Prior to the current Crew Consist Agreement, the Brakemen did not take promotion to Conductor. A 1985 Agreement between Burlington Northern and United Transportation Union stated that Brakemen hired before the Agreement would not be forced to take promotion to Conductor. The Brakemen understood this to mean that they would not be adversely affected later in employment for choosing not to become Conductors. A previous Crew Consist Agreement of December 5, 1980 promised that crew reduction would be made solely by attrition. The current Crew Consist Agreement of October 25, 1991, basically eliminated the position of Brakemen. The Charging Parties contend that they have lost their Brakeman seniority with the railroad and that their wages and benefits have been reduced.

The Charging Parties further alleged that United Transportation Union concurred with their present agreement thereby failing to afford them representation because of their age.

Both respondents, Burlington Northern Railroad and United Transportation Union deny that age was the basis for ratification

for the Consist Crew Agreement of October 25, 1991. Both respondents contend that the present Agreement between the employer and the labor organization is the result of reorganization, restructuring and modern technology.

The evidence shows that of a nationwide total of 4,606 persons classified as Brakemen, 2,681 or 58.25% are over age 40. Of the 2, 681 Brakemen over age 40, 1,787 or 67% are in the age group of 40-49; 733 or 27% are in the age group 50-59; 159 or 5.9% are in the age group 60-69 and 2 or .1% are over age 70.

1,924 or 41.8% of the 4,606 Brakemen are under age 40. 247 Brakemen are now age 40. Of this number 41 have 0-5 years service; 66 have 11-15 years of service; 89 have 16-20 years service and 51 of the 247 age 40 Brakemen have 21-25 years service. Additionally, the evidence shows that many Brakemen in the 50's age group have 5 years of less service.

The United Transportation Union contends that the 1980 passage of the *Staggers Rail Act* essentially deregulated rail industry to a great extent which eventually caused the engaging in downsizing and crew reduction by the railroad. Traditionally, 2-3 Brakemen were on a crew. The union contends that it opposed the elimination of most Brakeman positions. The evidence shows that on April 17, 1991, after determining that it could not reach a favorable agreement with the carrier, the union engaged in a legal nationwide strike because the issues in dispute were not successfully negotiated. On April 18, 1991, President Bush signed into law Public Law No. 102-29, the joint resolution of Congress ending the strike, establishing PEB 219's recommendations as the agreement of the parties, and establishing a Special Board to interpret, clarify and modify the recommendations of PEB 219. The evidence shows that the union

negotiated with Burlington Northern locally on Consist Crew Agreement but filed suit in federal district court challenging the constitutionality of Public Law No. 102-29. Without any other option, the United Transportation Union eventually agreed to a new crew consist agreement. The union also negotiated Side Letter #9 which required the carriers to assist non-promoted brakemen in preparing for the conductor's exam, which includes follow up exams, coaching and study materials. If a brakeman could not qualify for conductor, the employee could continue to work in train service, however, the carrier was not required to use the employee or continue a position blanked by the crew consist implementing document. Brakemen have several options under local agreements if their positions are actually eliminated: (1) brakemen's reserve board; (2) brakemen's extra board; (3) road local; (4) road switcher; or (5) any yard assignment.

The evidence shows that the elimination of Brakemen cuts across all age groups.

Insufficient evidence was found to support the charges that the Charging Parties have been discriminated against because of their age.

Based on this analysis, I have determined that the evidence obtained during the investigation does not establish a violation of the ADEA.

If the charge was filed within 300 days of the alleged discrimination, Charging Party may sue under the ADEA for recovery of backpay, an equal amount as liquidated damages, appropriate make-whole or injunctive relief, and attorney's fees and court costs.

Appendix C

A lawsuit under the Age Discrimination in Employment Act ordinarily must be filed within 2 years of the date of discrimination alleged in the charge. On November 21, 1991, the ADEA was amended to eliminate this 2 year limit. An ADEA lawsuit may now be filed any time from 60 days after a charge is filed until 90 days after receipt of notice that EEOC has completed action on the charge. Because it is not clear whether this amendment applies to instances of alleged discrimination occurring before November 21, 1991. If Charging Party decides to sue, a lawsuit should be brought within 2 years of the date of alleged discrimination and within 90 days of receipt of this letter, *whichever is earlier*, in order to assure the right to sue.

On Behalf of the Commission:

s/ Jacqueline R. Bradley
JACQUELINE R. BRADLEY
District Director

April 19, 1993
Date

APPENDIX D — DETERMINATION OF THE NEBRASKA EQUAL OPPORTUNITY COMMISSION DATED APRIL 16, 1993

STATE OF NEBRASKA
EQUAL OPPORTUNITY COMMISSION

E. Benjamin Nelson
Governor

Lawrence R. Myers
Executive Director

BEFORE THE NEBRASKA EQUAL OPPORTUNITY COMMISSION

Clarence E. Rosencutter	NEB 1-92/93-11-17600D EEOC 320 93 0209 NEB 1-92/93-11-17601D EEOC 320 93 0210
Cecil B. Miller	NEB 1-92/93-8-17246D EEOC 320 92 1895 NEB 1-92/93-8-17247D EEOC 320 92 1896
Robert G. Wenzel	NEB 1-92/93-8-17289D EEOC 320 92 1901 NEB 1-92/93-8-17290D EEOC 320 92 1902
Leroy W. Roth	NEB 1-92/93-8-17219D EEOC 320 92 1905 NEB 1-92/93-8-17220D EEOC 320 92 1906
Jerry J. Peterson	NEB 1-92/93-1017412D EEOC 320 92 1933 NEB 1-92/93-1017413D EEOC 320 92 1934

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Bruce A. Linville	NEB 1-92/93-8-17229D EEOC 320 92 1946 NEB 1-92/92-8-17230D EEOC 320 92 1947
Leroy J. Russell	NEB 1-92/93-8-17262D EEOC 320 92 1950 NEB 1-92/93-8-17263D EEOC 320 92 1951
Steven L. Brown	NEB 1-92/93-8-17211D EEOC 320 92 1952 NEB 1-92/93-8-17212D EEOC 320 92 1953
Boyd E. Bean	NEB 1-92/93-9-17355D EEOC 320 92 2089 NEB 1-92/93-9-17356D EEOC 320 92 2090
James L. Wells	NEB 1-92/93-10-17408D EEOC 320 92 2091 NEB 1-92/92-10-17409D EEOC 320 92 2092
Terry L. Petersen	NEB 1-92/93-9-17339D EEOC 320 92 2097 NEB 1-92/93-9-17340D EEOC 320 92 2094
Thomas S. Lowseth	NEB 1-92/93-10-17454D EEOC 320 92 2097 NEB 1-92/93-10-17455D EEOC 320 92 2098

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Tommie J. Putman	NEB 1-92/93-9-17404D EEOC 320 92 2129 NEB 1-92/93-9-17405D EEOC 320 92 2130
Kenneth D. Adams	NEB 1-92/93-10-17452D EEOC 320 92 2203 NEB 1-92/93-10-17453D EEOC 320 92 2204
David C. Osterman	NEB 1-92/93-11-17655D EEOC 320 93 0084 NEB 1-92/93-11-17656D EEOC 320 93 0085
Roy R. Sanchez	NEB 1-92/93-11-17548D EEOC 320 93 0086 NEB 1-92/93-11-17549D EEOC 320 93 0087
Earnest J. Hackler	NEB 1-92/93-11-17581D EEOC 320 93 0145 NEB 1-92/93-11-17582D EEOC 320 93 0146
Charles F. Smartt	NEB 1-92/93-1-17767D EEOC 320 93 0147 NEB 1-92/93-1-17768D EEOC 320 93 0148
Harold C. Vigil	NEB 1-92/93-11-17590D EEOC 320 93 0155 NEB 1-92/93-11-17591D EEOC 320 93 0156

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James W. Jenkins	NEB 1-92/93-11-17598D EEOC 320 93 0189 NEB 1-92/93-11-17599D EEOC 320 93 0190
John J. Stamate	NEB 1-92/93-11-17592D EEOC 320 93 0191 NEB 1-92/93-11-17593D EEOC 320 93 0192
Robert D. Mason, Jr.	NEB 1-92/92-11-17647D EEOC 320 93 0203 NEB 1-92/92-11-17648D EEOC 320 93 0204
Gerry W. Spinden	NEB 1-92/93-12-17679D EEOC 320 93 0205 NEB 1-92/93-12-17680D EEOC 320 93 0206
Lawrance H. Lowell	NEB 1-92/93-12-17687D EEOC 320 93 0215 NEB 1-92/93-12-17688D EEOC 320 93 0216
Ritchie E. Krmpotich	NEB 1-92/93-11-17649D EEOC 320 93 0219 NEB 1-92/93-11-17650D EEOC 320 93 0220
Richard F. Bibby	NEB 1-92/93-1-17757D EEOC 320 93 0221 NEB 1-92/93-1-17758D EEOC 320 93 0222

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Gary W. Boatright	NEB 1-92/93-11-17659D EEOC 320 93 0223 NEB 1-92/93-11-17660D EEOC 320 93 0224
Milburn B. Qualls	NEB 1-92/93-11-17596D EEOC 320 93 0225 NEB 1-92/93-11-17597D EEOC 320 93 0226
Gilbert R. Throm	NEB 1-92/93-11-17657D EEOC 320 93 0227 NEB 1-92/93-11-17658D EEOC 320 93 0228
Rodger D. Jessel	NEB 1-92/93-1-17778D EEOC 320 93 0229 NEB 1-92/93-1-17779D EEOC 320 93 0230
John D. Sullivan	NEB 1-92/93-12-17665D EEOC 320 93 0231 NEB 1-92/93-12-17666D EEOC 320 93 0232
Lawrence K. Honegger	NEB 1-92/93-12-17713D EEOC 320 93 0235 NEB 1-92/93-12-17714D EEOC 320 93 0236
Donald R. Smith	NEB 1-92/93-12-17681D EEOC 320 93 0322 NEB 1-92/93-12-17682D EEOC 320 93 0323

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David E. Dupree	NEB 1-92/93-12-17748D EEOC 320 93 0324 NEB 1-92/93-12-17749D EEOC 320 93 0325
Robert A. Bagby	NEB 1-92/93-11-17653D EEOC 320 93 0264 NEB 1-92/93-11-17654D EEOC 320 93 0265
Norman L. Hilgenberg	NEB 1-92/93-11-17651D EEOC 320 93 0267 NEB 1-92/93-11-17652D EEOC 320 93 0268
James P. Manary	NEB 1-92/93-12-17671D EEOC 320 93 0270 NEB 1-92/93-12-17672D EEOC 320 93 0271
Michael J. Thill	NEB 1-92/93-12-17691D EEOC 320 93 0272 NEB 1-92/93-12-17692D EEOC 320 93 0273
Ronald B. Hunt	NEB 1-92/93-12-17711D EEOC 320 93 0287 NEB 1-92/93-12-17712D EEOC 320 93 0288
Charles J. Shaffer	NEB 1-92/93-1-17763D EEOC 320 93 0351 NEB 1-92/93-1-17764D EEOC 320 93 0352

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James E. Newell	NEB 1-92/93-1-17769D EEOC 320 93 0396 NEB 1-92/93-1-17770D EEOC 320 93 0397
Stanley F. Vajdic, Jr.	NEB 1-92/93-12-17689D EEOC 320 93 0213 NEB 1-92/93-12-17690D EEOC 320 93 0214
Ross L. Eads	NEB 1-92/93-1-17822D EEOC 310 93 0327 NEB 1-92/93-1-17823D EEOC 310 93 0336
Leo B. Moser, Jr.	NEB 1-92/93-1-17784D EEOC 310 93 0329 NEB 1-92/93-1-17785D EEOC 310 93 0338
John R. Montague	NEB 1-92/93-2-17870D EEOC 310 93 0332 NEB 1-92/93-2-17871D EEOC 310 93 0340
Stephen L. Johnson	NEB 1-92/93-1-17817D EEOC 310 93 0333 NEB 1-92/93-1-17818D EEOC 310 93 0341
Kenneth W. McIntosh	NEB 1-92/93-10-17464D EEOC 320 93 1948 NEB 1-92/93-10-17465D EEOC 320 93 1949

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Robert A. Podjenski	NEB 1-92/93-7-17074D EEOC 320 92 1640 NEB 1-92/93-7-17075D EEOC 320 92 1641
Herschell B. Scovell	NEB 1-92/93-8-17114D EEOC 320 92 1642 NEB 1-92/93-8-17115D EEOC 320 92 1643
Ronald L. Roberson	NEB 1-92/93-8-17116D EEOC 320 92 1644 NEB 1-92/93-8-17117D EEOC 320 92 1645
Donald A. Raschke	NEB 1-92/93-7-17066D EEOC 320 92 1648 NEB 1-92/93-7-17067D EEOC 320 92 1649
Walter L. Allison	NEB 1-92/93-8-17231D EEOC 320 92 1654 NEB 1-92/93-8-17232D EEOC 320 92 1655
Cleo D. Schroeder	NEB 1-92/93-7-17070D EEOC 320 92 1656 NEB 1-92/93-7-17071D EEOC 320 92 1657
Donald K. Peters	NEB 1-92/93-7-17112D EEOC 320 92 1658 NEB 1-92/93-7-17113D EEOC 320 92 1659

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Ronald E. Ostendorf	NEB 1-92/93-7-17082D EEOC 320 92 1660 NEB 1-92/93-7-17083D EEOC 320 92 1661
Marvin Crabaugh	NEB 1-92/93-8-17157D EEOC 320 92 1663 NEB 1-92/93-8-17158D EEOC 320 92 1664
Carl D. Houk	NEB 1-92/93-8-17126D EEOC 320 92 1665 NEB 1-92/93-8-17127D EEOC 320 92 1666
Lloyd F. Barger	NEB 1-92/93-8-17160D EEOC 320 92 1667 NEB 1-92/93-8-17161D EEOC 320 92 1668
William J. Cooper	NEB 1-92/93-8-17137D EEOC 320 92 1669 NEB 1-92/93-8-17138D EEOC 320 92 1670
Ronald R. Johnson	NEB 1-92/93-7-17068D EEOC 320 92 1673 NEB 1-92/93-7-17069D EEOC 320 92 1674
Melvin E. Sayre	NEB 1-92/93-9-17357D EEOC 320 92 1675 NEB 1-92/93-9-17358D EEOC 320 92 1676

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Robert F. Lannon	NEB 1-92/93-7-17064D EEOC 320 92 1679 NEB 1-92/93-7-17065D EEOC 320 92 1680
Gerald T. Dueling	NEB 1-92/93-8-17221D EEOC 320 92 1681 NEB 1-92/93-8-17222D EEOC 320 92 1682
Philip J. Eberhardt	NEB 1-92/93-8-17141D EEOC 320 92 1683 NEB 1-92/93-8-17142D EEOC 320 92 1684
Richard L. Ryba	NEB 1-92/93-8-17168D EEOC 220 92 1770 NEB 1-92/93-8-17169D EEOC 320 92 1771
Roxie L. Jackson	NEB 1-92/93-9-17282D EEOC 320 92 1774 NEB 1-92/93-9-17283D EEOC 320 92 1775
Gene Montgomery	NEB 1-92/93-7-17021D EEOC 320 92 1585 NEB 1-92/93-7-17022D EEOC 320 92 1819
Walter T. Gronek	NEB 1-92/93-7-17010D EEOC 320 92 1586 NEB 1-92/93-7-17011D EEOC 320 92 1818

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Russell P. Eggers	NEB 1-92/93-7-17060D EEOC 320 92 1595 NEB 1-92/93-7-17061D EEOC 320 92 1820
Leonard K. Hiatt	NEB 1-92/93-7-17012D EEOC 320 92 1597 NEB 1-92/93-7-17013D EEOC 320 92 1822
Ronald G. Van Nortwick	NEB 1-92/93-7-17023D EEOC 320 92 1603 NEB 1-92/93-7-17024D EEOC 320 92 1817
Julian R. Nelson	NEB 1-92/93-8-17155D EEOC 320 92 1805 NEB 1-92/93-8-17156D EEOC 320 92 1806
Thomas M. McMurtry	NEB 1-92/93-8-17143D EEOC 320 92 1809 NEB 1-92/93-8-17144D EEOC 320 92 1810
Jack S. Tindall	NEB 1-92/93-8-17124D EEOC 320 92 1826 NEB 1-92/93-8-17125D EEOC 320 92 1827
Larry R. Mann	NEB 1-92/93-3-17359D EEOC 320 92 1828 NEB 1-92/93-3-17360D EEOC 320 92 1829

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Maurice F. McDonald	NEB 1-92/93-8-17170D EEOC 320 92 1752 NEB 1-92/93-8-17171D EEOC 320 92 1753
Carl L. Croom	NEB 1-92/93-8-17133D EEOC 320 92 1754 NEB 1-92/93-8-17134D EEOC 320 92 1755
Gary L.Searcey	NEB 1-92/93-8-17135D EEOC 320 92 1786 NEB 1-92/93-8-17136D EEOC 320 92 1787
Kenneth R. Covington	NEB 1-92/93-8-17130D EEOC 320 92 1788 NEB 1-92/93-8-17131D EEOC 320 92 1789
Ronald E. Kraus	NEB 1-92/93-8-17217D EEOC 320 92 1875 NEB 1-92/93-8-17218D EEOC 320 92 1876
Francesko J. Ramirez	NEB 1-92/93-8-17174D EEOC 320 92 1877 NEB 1-92/93-8-17175D EEOC 320 92 1878
Michael E. Valentine	NEB 1-92/93-8-17252D EEOC 320 92 1879 NEB 1-92/93-8-17252-D EEOC 320 92 1880

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Michael D. Thomlison	NEB 1-92/93-8-17153D EEOC 320 92 1881 NEB 1-92/93-8-17154D EEOC 320 92 1882
Gary L. Yanken	NEB 1-92/93-8-17204D EEOC 320 92 1883 NEB 1-92/93-8-17205D EEOC 320 92 1884
Patrick M. Herrley	NEB 1-92/93-8-17163D EEOC 320 92 1692 NEB 1-92/93-8-17162D EEOC 320 92 1912
Mike I. Carlson	NEB 1-92/93-8-17164D EEOC 320 92 1693 NEB 1-92/93-8-17165D EEOC 320 92 1913
Charles F. Putman	NEB 1-92/93-8-17215D EEOC 320 92 1694 NEB 1-92/93-8-17216D EEOC 320 92 1914
Frank Hontz	NEB 1-92/93-10-17527D EEOC 320 92 1695 NEB 1-92/93-10-17528D EEOC 320 92 1915
Preston G. Havens, Jr.	NEB 1-92/93-9-17280D EEOC 320 92 1982 NEB 1-92/93-9-17281D EEOC 320 92 1983

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Dale Young	NEB 1-92/93-9-17284D EEOC 320 92 1988 NEB 1-92/93-9-17285D EEOC 320 92 1889
Frank J. Singer	NEB 1-92/93-9-17291D EEOC 320 92 2002 NEB 1-92/93-9-17192D EEOC 320 92 2003
Robert F. McIntosh	NEB 1-92/93-10-17466D EEOC 320 92 2004 NEB 1-92/93-10-17467D EEOC 320 92 2005
Floyd G. Linn	NEB 1-92/93-8-17244D EEOC 320 92 2042 NEB 1-92/93-8-17245D EEOC 320 92 2043
Robert L. Michaels	NEB 1-92/93-8-17233D EEOC 320 92 2064 NEB 1-92/93-8-17234D EEOC 320 92 2065
Matt Phagan	NEB 1-92/93-10-17406D EEOC 320 92 2095 NEB 1-92/93-10-17407D EEOC 320 92 2096
Jerrold B. Hutchings	NEB 1-92/93-10-17414D EEOC 320 92 1652 NEB 1-92-93-10-17415D EEOC 320 92 1653

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Robert L. Arndt	NEB 1-92/93-10-17470D EEOC 320 92 2251 NEB 1-92/93-10-17471D EEOC 320 92 2252
Randall O. Swarthout	NEB 1-92/93-8-17213D EEOC 320 92 1696 NEB 1-92/93-8-17214D EEOC 320 92 1916
Sammy L. Cross	NEB 1-92/93-9-17353D EEOC 320 92 1697 NEB 1-92/93-9-17354D EEOC 320 92 1911
Darrel D. Miller	NEB 1-92/93-8-17250D EEOC 320 92 1891 NEB 1-92/93-8-17251D EEOC 320 92 1892
Ronald L. Stoddard	NEB 1-92/93-8-17202D EEOC 320 92 1893 NEB 1-92/93-8-17203D EEOC 320 92 1894
James D. Tolle	NEB 1-92/93-8-17264D EEOC 320 92 1897 NEB 1-92/93-8-17265D EEOC 320 92 1898
Larry S. Clark	NEB 1-92/93-8-17254D EEOC 320 92 1899 NEB 1-92/93-8-17255D EEOC 320 92 1900

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Robert T. Epler	NEB 10-92/93-9-17343D EEOC 320 92 1873 NEB 1-92/93-9-17344D EEOC 320 92 1874
Clifford D. Smith	NEB 1-92/93-8-17257D EEOC 320 92 1903 NEB 1-92/93-8-17258D EEOC 320 92 1904
Richard W. Cavender	NEB 1-92/93-10-17410D EEOC 320 92 1921 NEB 1-92/93-10-17411D EEOC 320 92 1922
Ivan C. Walker	NEB 1-92/93-9-17351D EEOC 320 92 2282 NEB 1-92/93-9-17352D EEOC 320 92 2283
Duane K. Hinkle	NEB 1-92/93-11-17602D EEOC 320 93 0262 NEB 1-92/93-11-17603D EEOC 320 93 0263
Russell J. Jairell	NEB 1-92/93-1-17782D EEOC 310 93 0326 NEB 1-92/93-1-17783D EEOC 310 93 0335
Larry L. Burback	NEB 1-92/93-12-17750D EEOC 320 93 0246 NEB 1-92/93-12-17751D EEOC 320 93 0247

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Everett D. Carrico

NEB 1-92/93-11-17613D
EEOC 320 93 0289
NEB 1-92/93-11-17614D
EEOC 320 93 0290

Stephen J. Miller

NEB 1-92/93-11-17615D
EEOC 320 93 0320
NEB 1-92/93-11-17616D
EEOC 320 93 0321

Kim R. Hardman

NEB 1-92/93-3-18030-D
EEOC 320 93 0187
NEB 1-92/93-3-18031-D
EEOC 320 93 0188

Complainant(s),

vs.

Union Pacific Railroad
United Transportation Union

Respondent.

1. **JURISDICTION** — These charges involve allegations of violation of the Nebraska Act Prohibiting Unjust Discrimination in Employment Because of Age occurring on or about February 1, 1992. The charges were filed between July 15, 1992 and March 24, 1993 and were timely served upon the Respondents, Union Pacific, a railroad employing more than twenty-five individuals with the headquarters in Omaha, Nebraska and the United Transportation Union, a union which represents the Complainants.

Appendix D

2. **THE CHARGE** — The Complainant(s) alleges that the Respondent has discriminated against them on the basis of their ages (40 and over) in that the Crew Consist Agreement, effective February 1, 1992, basically eliminates the position of brakeman and forces brakemen to apply and accept a promotion to conductor. The Complainant(s) further alleges that the railroad and the union signed an agreement that brakemen hired before November 1, 1985 would not be forced to accept promotion to conductor and would not be adversely affected for not choosing to accept a promotion. The Complaint(s) alleges that with a forced promotion to conductor, they lose all of their brakemen seniority.

3. **RESPONDENTS' POSITION** — A. The Union (UTU) denies the charge of age discrimination. The Union states that over the years UTU and Union Pacific Railroad (UPRR) have been parties to various national collective-bargaining agreements with the agreement in effect prior to 1991 being dated October 31, 1985.

The Union states that since the 1980 passage of the *Staggers Rail Act* which essentially deregulated the rail industry to a great extent, the rail carriers have been engaging in downsizing and crew reduction. Due to technological advances certain positions became obsolete and were eventually eliminated, mostly by attrition. According to the Union, in recent years the railroads felt that the two remaining brakemen positions on a train crew were obsolete and should be eliminated and that the elimination by attrition was too slow. The UTU maintains it was opposed to the elimination of these positions.

The UTU states that the issue of crew consist had always been bargained locally. However in 1988, the UTU pursuant to

procedures under the Railway Labor Act (RLA) served notice on the National Railway Labor Conference (NRLC), the major rail carriers' bargaining arm to open up negotiations of the 1985 contract. The NRLC, in turn, served notice on the UTU seeking elimination of most brakemen positions and the mandatory promotion of all brakemen.

The UTU reports that the parties were unable to reach an agreement and a request was made to the National Mediation Board (NMB) to intervene. Their efforts were unsuccessful.

UTU states that President Bush, in order to avoid a railroad strike, ordered establishment of Presidential Emergency Board #219 (PEB) and PEB issued recommendations for a national agreement. Despite these recommendations, an agreement was not reached, a strike ensued on April 17, 1991 and Congress passed a Joint Resolution mandating the implementation of the PEB recommendations. One of these recommendations stated that brakemen who are eligible to be promoted to conductor should be required to take the promotion.

Therefore, the UTU contends the elimination was based on the lack of work, not on age and that those brakemen younger than 40 will be equally effected. The UTU maintains that brakemen positions contain employees both younger and older than 40. Those who are under 40 will have less opportunity than those over 40 as they generally will have less brakemen seniority and will not be able to bid and hold many jobs. Those with the most brakemen seniority, generally 40 and over will be in a better position to bid for jobs and displace those junior in seniority. Seniority is established when the employee first works in the craft. Additionally, the UTU states that the brakemen have had numerous opportunities over the last 40 years to take the

conductor's exam and that since 1970 the conductor's exam has generally been offered twice a year and is open to those with two or more years of brakemen seniority.

B. The Union Pacific Railroad Company denies that the Complainants have been subjected to Age discrimination. The UPRR states that the terms of the National Agreement which the Complainants allege constitute unlawful discrimination were in fact legislatively imposed and therefore their charges should be dismissed.

4. **COMPLAINANT'S STATEMENT** — The Complainant(s), who was working for the Respondent as a brakeman at the time of the alleged harm, stated that a 1985 agreement between the Union Pacific Railroad and the United Transportation Union contained a provision that brakemen hired before the 1985 agreement would not be forced to take promotion to conductor. According to the Complainant(s), the agreement meant that the brakemen would not be adversely affected later in employment for choosing not to become a conductor. Additionally, the brakemen were promised in June 1984 Crew Consist Agreement that crew reduction would be made solely by attrition.

The Complainant(s) state that under the current (effective February 1, 1992) Crew Consist Agreement they have less control in their jobs and earn less money and generally have more overall seniority with the railroad than younger employees who elected to take promotion to conductor earlier. The Complainant(s) believes that saving money by reducing the wages of older, higher earning employees with the most seniority was the motivation behind the February 1, 1992 Crew Consist Agreement.

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WITNESS STATEMENTS

5. Lester E. Mood, Respondent's Manager-EEO Compliance, stated that Respondent will still have the position of brakemen, however it will be phased out for over the road trips, but brakemen will still be needed to work in the yard. Mr. Mood indicated that since only a few brakemen would be needed only those brakemen with years of seniority will have the duties of brakemen and the rest would be furloughed.

Mr. Mood stated that when a brakemen passes the conductor's test then he is placed on the conductor's roster along with his corresponding new seniority date. The seniority date for each position is separate and dependent upon when an individual qualifies for that position.

DESCRIPTION OF DOCUMENTS

6. The UTU submitted the collective-bargaining agreement dated October 31, 1985 between the Union Pacific Railroad and the United Transportation Union. It states in Section 4 — Promotion that "Trainmen who established seniority prior to November 1, 1985 will be governed by existing rules with respect to promotion to conductor/foreman and will not be required to accept promotion to engine service."

7. The UTU submitted documents relating to the July 25, 1988 notice that was served on the National Railway Labor Conference (NRLC) which is the major rail carriers' bargaining arm. The UTU served notice on the NRLC to make changes in the 1985 collective bargaining agreement in the area of wage and health care.

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In October 7, 1988 notice that the NRLC served on UTU in response to their July 25, 1988 action were the proposals to ". . . revise crew consist rules to provide for a maximum of one conductor (foreman) and one brakemen (helper) on all crews except on through freight, work train, transfer assignments and other appropriate operations which shall be operated with a conductor only" and to "require any train service employee to accept promotion to conductor and/or engine service or forfeit seniority and terminate employment relationships."

8. The Union and the Complainant(s) submitted the recommendations of the Presidential Emergency Board #219 (PEB 219). Because the railroads and the union could not reach agreement on the notices served in 1988 the National Mediation Board (NMB) which is a federal agency empowered to mediate railroad-labor disputes was asked by all parties on April 11, 1989 to intervene and mediate. NMB was unsuccessful in its attempts and on May 3, 1990 President Bush, under Section 10 of the Railway Labor Act, intervened and appointed Presidential Emergency Board No. 219. The purpose of this Board was for it to issue recommendations that would avoid a rail strike.

9. All parties submitted the PEB 219's final report dated January 15, 1991. Regarding crew consist issues, PEB 219 recommended the issue not be handled nationally and the matter must be bargained to resolution in 1991. The Board further recommended that if there was no agreement concerning crew consist by October 10, 1991 then either party may request arbitration. The arbitration panel will render a decision within 60 days of its appointment or by December 31, 1991, whichever occurs first. PEB 219 recommended that the arbitration panel have the power to resolve any crew consist dispute brought before it.

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Regarding the issue of mandatory promotion, PEB 219 recommended that all brakemen who are offered promotion to conductor should be required to accept such promotion.

10. All parties submitted the Join Resolution, Public Law Number 102-29 which was passed by Congress on April 18, 1991 to end the national railway strike that began on April 17, 1991 as a result of the railways and the union not reaching a national agreement. P.L. 102-29 established a three member "Special Board" and one member was to have served on PEB 219 and the other two were chosen by the President from a list supplied by the NMB. The board shall accord a presumption of validity to the recommendations of PEB 219 and can only address those issues about which PEB made specific recommendations. The PEB recommendations along with any modifications of the Special Board shall be binding upon the parties and shall have the same effect as though it was arrived at by agreement of the parties under the Railway Labor Act (45 U.S.C. 151 et seq). There is also a preclusion of judicial review, in that there is no judicial review of any report of determination of the Special Board under this section.

11. The Union submitted a complete copy of PEB 219 and Public Law 102-29 Implementing Documents effective November 1, 1991 between railroads represented by the National Carrier's Conference Committee and employees of such railroads represented by the UTU. These documents are applicable to all employees represented by the UTU. Article V deals with promotion/retention of seniority. It states "All trainmen must accept promotion to conductor/foreman when offered by the railroad. Once promoted, trainmen, including those already promoted, will not be permitted to voluntarily relinquish conductor/foreman rights."

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12. The Union and the Complainant(s) submitted a copy of the suit filed in the federal District Court for the District of Columbia challenging the constitutionality of Pub. L. No. 102-29, focusing on the subsection which overrode local meritoriums which had banned negotiation on crew consist. UTU argued in this suit that because Pub. L. No. 102-29 creates procedures by which UTU and the railroads must negotiate or arbitrate on the crew consist issue, the law is unconstitutional. According to the suit, "the railroads, UTU and the United States are now before this Court regarding the issue of whether the crew consist portion of 102-29 exceeds the scope of the Commerce Clause and whether it constitutes a taking under the Fifth Amendment." The Court noted that the Supreme Court has long since established the vast expanse of the Commerce Clause and that Congress has frequently exercised its commerce power with regard to the rail industry. The Court concluded that Pub. L. No. 102-29 did not violate the Commerce Clause or the Fifth Amendment and noted that just because the crew consist issue had traditionally been handled at the local level does not imply that Congress will not one day take it up.

13. The Union submitted side letter #9 with the NRLC. This agreement required the carriers to assist non-promoted brakemen in preparing for the conductor's exam, including follow-up exams, coaching and study materials. Additionally, if a brakemen could not qualify for conductor, the employee could continue to work in train service, however the carrier was not required to use the employee or continue a position "which otherwise would be blanked under a crew consist agreement." During periods when "he does not stand to a position because any of these conditions exist he will be furloughed."

14. The Union submitted the December 19, 1991 agreement

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between Union Pacific Railroad company and UTU that deals with crew consist that became effective February 1, 1992. This agreement amends the June 29, 1984 crew consist agreement. The agreement states (b) "If in the application of Presidential Emergency Board 219, it is determined that all employees must take promotion to conductor, and in the application of those provisions, a pre-October 31, 1985 employee who can hold any job other than a conductor's position will not be obligated to take the conductor's examination. If, however, the employee is later unable to hold such a position, the employee will be given thirty (30) days in which to take promotion. Failure to do so will disqualify the employee from holding a position. When conditions exist that require an employee to take the conductor's examination, such employee will also be subject to any penalties that may be imposed through the National Agreement. *NOTE:* This section is phased in to provide an opportunity for non-promoted brakemen to become qualified conductors. (C) "The carrier will hold promotion classes on a regular basis to provide the opportunity for non-promoted trainmen to qualify." The agreement concluded that "with respect to the propriety of the Carrier's notice, the Agreement fulfills the requirements of Presidential Emergency Board 219 with respect to Crew Consist."

15. The Complainant(s) submitted a series of seniority rosters for the brakemen that indicates their current status since the implementation of the February 1, 1992 crew consist agreement. These rosters show what option the employee chose and if he took the conductor's exam then it shows the resulting conductor's seniority date. These documents verify that these individuals lost their brakemen seniority dates when they were placed on the conductor seniority roster.

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16. UPRR submitted documentation regarding the number and ages of employees working as brakemen. They indicate they have 4339 employees working as brakemen and of these, 2946 (68%) are age 40 or older. Of these 2946 employees, 1923 (44%) are in the age group 40-49; 951 (22%) are in the age group 50-59; 72 (2%) are in the age group 60-69 and none are over age 70.

COMMISSION DETERMINATION

The issue in these cases is whether the implementation of the Crew Consist Agreement effective February 1, 1992 discriminates against the Complainant(s) on the basis of age.

Having reviewed the evidence obtained in the investigation of this issue, as briefly outlined in the preceding pages, the Commission hereby makes the following findings and conclusions:

1. The charge was timely filed under the Act Prohibiting Unjust Discrimination In Employment Because of Age, and the Commission has jurisdiction over the parties and the issue raised;

2. A prima facie showing regarding the issue raised was made by the evidence, as required by controlling legal authority;

3. The Respondent articulated legitimate, nondiscriminatory reasons for its actions with respect to the issue raised in this charge;

4. The Commission has examined the evidence, pursuant to controlling legal authority, to determine whether the reasons articulated by the Respondent are pretexts to mask unlawful Age discrimination. The Commission concludes that the evidence fails to establish that the Respondent's reasons are pretextual.

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The evidence clearly shows that the Crew Consist Agreement which began effective February 1, 1992 brought major changes including the mandatory requirement that brakemen apply for promotion to the conductor's position. Prior to this agreement brakemen had ample opportunity to take the conductor's exam, but whether to do so was strictly voluntary. However, the evidence clearly establishes that the ages of the brakemen was not a factor in this decision. The change in the crew consist agreement arose out of legislation that was implemented by Congress to avoid a nationwide railway strike. This agreement affects all brakemen regardless of their age. The evidence also does not show that employees over age 40 are more adversely impacted than persons under age 40.

Therefore, in accordance with the Act Prohibiting Unjust Discrimination In Employment Because of Age and the Rules and Regulations of the Nebraska Equal Opportunity Commission, having found insufficient evidence to credit the Complainant's allegations, the Commission accordingly finds **NO REASONABLE CAUSE** to believe that the respondent has violated the Act Prohibiting Unjust Discrimination In Employment Because of Age as alleged, and hereby **DISMISSES** the subject charge.

APR 16 1993
Date

s/ Kathryn L. Kaklas
Commission Chairperson

APPENDIX E — MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS DATED OCTOBER 25, 1993

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Civil Action No. 93-CV-209 B

LEONARD K. HIATT, et al

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah Corporation; and UNITED TRANSPORTATION UNION,

Defendants.

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AND

Civil Action No. 93-CV-210 J

JEROME J. SMITH, et al.

Plaintiffs,

v.

BURLINGTON NORTHER RAILROAD COMPANY, a Delaware Corporation; and UNITED TRANSPORTATION UNION,

Defendants.

COMBINED RESPONSE MEMORANDUM IN OPPOSITION TO DEFENDANTS MOTIONS TO DISMISS OR, IN THE ALTERNATIVE, FOR SOME DEFENDANTS, FOR SUMMARY JUDGMENT

COMES NOW, the Plaintiffs in the above captioned civil actions by and through their attorneys, Herschler, Freudenthal, Salzburg, Bonds, & Rideout, P.C. and the Law Offices of John W. McKendree and submit herewith their Combined Response Memorandum in Opposition to Defendants Motions to Dismiss or, in the alternative, for some Defendants, for Summary Judgment. Plaintiffs demonstrate herein that each such Defendant's Motion is without merit and that this Honorable Court should enter its Order directing each such Plaintiff to file its Answer to the respective Amended Complaint.

Since there are four separate motions by the Defendants in two separate civil actions, this Combined Response

Memorandum shall endeavor to address them jointly except where, for the reasons set forth *infra*, one motion or portion thereof must be treated separately. Moreover, for the convenience of the Court, Plaintiffs shall refer herein to Civil Action 93-CV-209 B as the Union Pacific Lawsuit and to Civil Action 93-CV-210 J as the Burlington Northern lawsuit. The respective parties to those civil actions shall be referred to herein as either Defendants, "UP" for Union Pacific Railroad Company, "BN" for the Burlington Northern Railroad Company, and "UTU" for the United Transportation Union.

In the case of the attachments, affidavits or exhibits to the Defendants' Memorandums in Support of their respective Motions to Dismiss and/or for Summary Judgement, they will be referred to by party number as follows:

Union Pacific Lawsuit - UP Exhibit, UP Attachment, UP Affidavit or UTU Exhibit.

Burlington Northern Lawsuit - BN Exhibit, BN Attachment, BN Affidavit or UTU Exhibit

I.

INTRODUCTION

The Age Discrimination in Employment Act, 29 U.S.C. Sections 621 *et seq.*, (hereafter, ADEA) prohibits discrimination by employers and labor organizations against any individual "because of such individual's age" in terms, conditions or privileges of employment. 29 U.S.C. Section 623. The railroad industry, railroad unions and employees are not exempt from coverage under this Act. The Plaintiffs in these two civil actions invoke the protection of this Act, demonstrate their entitlement to

such protection, and demonstrate that neither the Presidential Emergency Board,[1] the Congress of the United States, the President of the United States[2] nor the Special Board[3] created by Public Law 102-29 deprived Plaintiffs' of the protection guaranteed by the ADEA.

A simple reading of Plaintiffs' Complaints reveal that they are not complaining of the actions which occurred prior or subsequent to Public Law 102-29 (BN Exhibit F, UP Exhibit 2, Appendix A and UTU Exhibit 6, and described in *United Transportation Union v. United States of America*, 987 F.2d 784 (D.C. Cir. 1993) (BN Exhibit H) until the parties, either BN or UP, entered into negotiations with the UTU through their multi-party bargaining agent and reached the Crew Consist Agreements referred to in the Burlington Northern lawsuit's Amended Complaint at paragraphs 61-77 and in the Union Pacific lawsuit's Amended Complaint at paragraphs 79-95. As demonstrated *infra*, Defendants efforts at mischaracterizing Plaintiffs' allegations are misplaced and the attached affidavits ought to dissuade Defendants concerning the precise issues raised by the Plaintiffs herein. The Court will note that each of these civil actions is a single claim for relief suit designed to focus the Court's attention on the ADEA issue presented by the actions of the Defendants and not the determinations of the Congress of the United States, the President of the United States or any agency of the United States created to administer the Railway Labor Act, including the PEP 219 or the Special Board.

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1. UTU/UP Exhibit 2, UP Hinkley Affidavit Exhibit 1, BN Exhibit E

2. UTU/UP Exhibit 6, BN Exhibit F

3. UP Hinckley Affidavit Exhibit 2, BN Exhibit I

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Plaintiffs' Amended Complaints in these two civil actions, therefore, clearly fit into the mold of *Cook v. Pan American World Airways, Inc.*, 771 F.2d 635 (2nd Cir. 1985), a decision involving a very similar fact pattern and arguments presented by the Defendants herein. Therein, the conduct alleged to be violative of the ADEA dealt with seniority roster mergers of different employee groups as a result of a merger between airlines and the proceedings under the Federal Aviation Act, 49 U.S.C. Section 1378, et seq. Therein, the ADEA violative conduct at issue involved merged seniority rosters established through arbitration ordered in connection with the Civil Aeronautics Boards' (hereafter, CAB) orders issued in connection with the approval of the airlines' merger. The carriers and union defendants claimed, *inter alia*, that the integrated seniority list formulated by the parties' mutually-selected arbitrator pursuant to the CAB's decisions and orders could not be challenged in the ADEA suit since it was an "impermissible collateral attack on a final order of the CAB" and they were merely complying with that legal obligation. The Second Circuit dismissed this argument out of hand relying upon, *inter alia, McDonald v. City of West Branch*, 466 U.S. 284, 104 S.Ct.1799, 80 L.Ed2d 302 (1984) (civil rights claim under 42 U.S.C. 1983); *Barentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1941) (Minimum wage provisions of Fair Labor Standards Act); *Alexander v. Gardner-Denver Co.*, 450 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974) (Title VII action). *Cook v. Pan American World Airways, supra* at 771 F.2d 641

In finding that the court had subject matter jurisdiction, the Second Circuit in *Cook* stated:

> "Applying these principles here, the record does not reveal any CAB ruling on the

> question now raised by the plaintiffs of whether the integrated seniority lists formulated by Arbitrator Gill were unfair as age-discriminatory. The CAB made no independent inquiry into possible age discrimination and held no evidentiary hearing. Indeed, none of the parties presented an issue of age discrimination the Board . . . . *Cook v. Pan American World Airways, supra* at 771 F.2d 642

The Second Circuit concluded, as Plaintiffs urge this Honorable Court must rule because of the ADEA's statutory grant of *de nova* review to the proceedings underlying the Current Crew Consist Negotiations after the P.L. 102-29 matters, this action is not barred by the reason of the collateral attack doctrine. This position at this juncture is strengthen because no Defendant herein presented any evidence that at any stage of the proceedings prior to the Current Crew Consist Agreement, did anyone give consideration to the ADEA issues presented herein.

A detailed factual predicate of the events leading up to the actions of the Defendants in their negotiations of the Current Crew Consist Agreement is best found at *United Transportation Union v. United States of America, supra*, at 987 F2d. 785-787 which recitation of the facts leading up to this lawsuit the Plaintiffs' incorporate by reference. (BN Exhibit H and UP Exhibit 2, Appendix A).

A. PROCEDURAL BACKGROUND

On or about July 16, 1993, Plaintiffs filed their civil actions in the United States District Court for the District of Wyoming and their Amended Complaints thereafter.

Appendix E

1. Civil Action No. 93-CV-209 B
The Union Pacific Suit

On or about October 10, 1993, Defendant UTU filed its Motion to Dismiss the Complaint against what it characterized as the United Pacific Railroad Company civil action moving for dismissal "on the ground that the Plaintiffs failure to state a claim upon which relief can granted." Attached to its Memorandum in Support of its Motion to Dismiss, Defendant UTU filed six exhibits but did not claim those exhibits altered their motion to one for summary judgment pursuant to Fed. R. Civ. P. 56. The attached exhibits are:

UTU/UP Exhibit 1 - The October 31, 1985 Crew Consist Agreement between the National Carriers' Conference Committee and the UTU

UTU/UP Exhibit 2 - The Report to the President by Emergency Board No. 219

UTU/UP Exhibit 3 - PEB No. 219 and PL 102-29 Implementing Documents

UTU/UP Exhibit 4 - *Local 1389, United Transportation Union, et al. v. United Transportation Union and CSX Transportation, Inc.*, Civil Action 92-56, Slip op. (E.D. Ky., Ashland Div. 1992)

UTU/UP Exhibit 5 - National Railway Labor Conference letter of October 7, 1988 concerning "National Negotiations," and UTU's Proposals in their Section 6 Notice pursuant to 45 U.S.C. Section 156

UTU/UP Exhibit 6 - P.L. 102-29, 105 Stat. 169

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Defendant UTU's principal argument is that Plaintiffs, in their Complaint, "are disputing" "the affect of Public Law No. 102-29." [UTU Memorandum, p.1] UTU characterizes its view of the events leading up to the execution and implementation of the Current Crew Consist Agreement at issue. [UTU Memorandum, pp. 2-4] UTU admits to its execution and agreement to the Current Crew Consist Agreement "[a]fter some negotiations, between NCCC and UTU" [*Cf.* Complaint, Paragraph 79]. UTU/UP Exhibit 3 provides [in Article V]:

> a. All trainmen must accept promotion conductor/foreman when offered by the railroad. Once promoted, trainmen, including those already promoted will not be permitted to voluntarily relinquish conductor/foreman rights." [*Id.* at p. 23]

The factual predicate for this position is not supported by the ADEA Complaint or the facts presented. (PLS. UP Affidavits; Plaintiff L. Hiatt's Affidavit, Paragraph 5, in particular).

The legal basis for UTU's motion rests on the foundation that it was forced by the Congress of the United States to acceptance of the Current Crew Consist Agreement and that no liability can be attached to UTU by his Court for such compliance. Moreover, UTU cites, *United Transportation Union v. United States of America*, 987 F.2d 784 (D.C. Cir. 1993), in support of its allegations that it did all that could be expected of a Union under the circumstances and that no liability can, therefore, be assigned to UTU and, therefore, Plaintiffs' Complaint must be dismissed. (*Cf. Cook V. Pan American World Airways, supra*).

Finally, UTU claims that Plaintiffs claims are "artfully pled"

and are "disguise(d)" disputes under the Railway Labor Act. This position is premised upon *Leu v. Norfolk & Western Ry.*, 820 F.2d 825, 830-31 (6th cir. 1987). UTU attempts to claim that Plaintiff's factual allegations are not truly ADEA claims but, in reality, are complaints "about their current seniority positions and wages;" thus, UTU opines Plaintiffs claims are disputes growing out of the interpretation or application of the Current Crew Consist Agreement and must be arbitrated rather than litigated before this Honorable Court. UTU relies upon Section 3 First(1) of the Railway Labor Act, 45 U.S.C. Section 3 First(1), *Consolidated Rail Co. v. Railway Labor Executives' Association*, 491 U.S. 299, 303-34 (1989) and *Andrews v. Louisville & Nashville RR*, 406 U.S. 320 (1972). UTU's position in this regard is without both factual or legal basis and as demonstrated *infra*, must be denied. (*Cf. Robinson v. Transworld Airlines, Inc.*, 947 F2d 40 (2nd Cir. 1991)

On or about September 13, 1993, Defendant Union Pacific Railroad Company filed its Fed. R. Civ. P. Rules 12(b)(6) and 56 Motions claiming, in essence, that judgment must enter as the "agreement at issue was negotiated in accordance with mandates of the Congress of the United States as set forth in Public Law No.102-29." Attached to its Memorandum, Defendant UP filed the following affidavits and Exhibits:

UP Affidavit - W. Scott Hinckley, Director - Labor Relations for Union Pacific and attached exhibits set forth below:

Hinckley Exhibit 1 - Report to the President by Emergency Board No. 219

Hinckley Exhibit 2 - Report of the Special Board (102-29)

Appendix E

Requests for Modification, dated July, 18, 1991

Hinckley Exhibit 3 - Crew Consist Agreement with UTU effective February 1, 1992

As demonstrated *infra*, both UTU and UP Defendants produced no evidence to rebut the discrimination issues presented in this civil action under the ADEA. Thus, for example, in the affidavits of the Union Pacific Plaintiffs attached thereto, the evidence demonstrates that there was no attempt by these Defendants to preserve these employees' years of service's earned job conditions by either dovetailing with other employees their years of service or otherwise distributing the burden of having to work the longer hours and performing more physically demanding work in a manner designed to ensure that the age protected employees would not be discriminated against. What the Defendants did on their own without government intervention, was to enter into an agreement which caused the discrimination at issue by assuring those benefits lost by the older employees in fact accrued to the younger employees and bargaining unit members. (*Cook v. Pan American World Airways, Inc.*, *supra*. UP Plaintiffs Affidavits, p. 2, *et seq.*; Lead Plaintiff L. Hiatt, Affidavit, Paragraph 5, specifically; *cf.* Complaint, Paragraphs 31, 77-86).

2. Civil Action No 93-CV-210 J
The Burlington Northern Suit

On or about October 10, 1993, Defendant UTU filed its Motion to Dismiss the Complaint against it in this civil action pursuant to Fed. R. Civ. P. 12(6)(6) alleging as a basis a violation of the statute of limitations. The Memorandum in Support of the Motion is almost identically worded to the Memorandum in

Support of the Union Pacific suit and does not identify what statute of limitations is allegedly violated by this ADEA Complaint. Moreover, the exhibits attached to the Memorandum are identical to those itemized above. Plaintiffs Exhibit 1, the Determination of the Dallas District Office of the U.S. Equal Employment Opportunity Commission, [hereafter, EEOC] specifically states that "[a]ll requirements for coverage have been met." *Id.*, p. 1. In the last paragraph of the EEOC Determination, Plaintiffs were informed that:

> A lawsuit under the Age Discrimination in Employment Act ordinarily must be filed within 2 years of the date of discrimination alleged in the charge. On November 21, 1991, the ADEA was amended to eliminate this 2 year limit. An ADEA lawsuit may now be filed any time from 60 days after a charge is filed until 90 days after receipt of notice that EEOC has completed action on the charge. Because it is not clear whether this amendment applies to instances of alleged discrimination *occurring before November 21, 1991.* (sic) If Charging Party decides to sue, a lawsuit should be brought within *2 years of the date of alleged discrimination and within 90 days of receipt of this letter, whichever is earlier,* in order to assure the right to sue. *Id.*, p. 3

Since the original Complaint was filed on July 16, 1993, and no evidence has been produced by the UTU contradicting the allegations in Paragraphs 7-58 of the First Amended Complaint, its Motion to Dismiss must be denied. This is especially the case

since UTU not only failed to produce any evidence on its statute of limitations argument, it failed to identify the statute of limitations upon which its motion was based. In the context of the early stage of this civil action, Plaintiffs cannot be called upon to guess concerning the statute at issue in UTU's motion. To the extent that this motion to dismiss is considered by the Court to be premised on the same basis as UTU's motion in the Union Pacific suit, Plaintiffs arguments therein equally apply. Nevertheless, Plaintiffs urge that absent any evidence or authority citation in support of the statute of limitations Rule 12(b)(6) motion, it be dismissed. Fed R. Civ. P. 12(b); *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1952); *see Paclini v. Channel Home Centers*, 668 F.2d 721 (3rd Cir. 1981) (dismissal was improper where the material allegations of plaintiff's complaint, viewed in their most favorable light, were legally sufficient to establish a claim).

On or about September 7, 1993, Defendant Burlington Northern Railroad Company, [hereafter, BN] filed its Motion to Dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(1) and (6). Primarily relying upon Public Law 102-29, BN claims in its Memorandum in Support of its motions that "... Congress mandated that the crew consist issue be reopened and that brakemen be compelled to accept promotion to conductor status"; and the "Congress further directed that there should be no judicial review of these determinations." [BN Memorandum, p. 3; BN Exhibit F, a copy of Public Law 102-29 and Section 3(g) thereof].

BN, as the Plaintiffs herein also do, place particular reliance upon the history of the labor dispute which resulted in the Current Crew Consist Agreement at issue, as described by the United

States Court of Appeals for the District of Columbia Circuit in *United Transportation Union v. United States of America, et al, No. 92-5002; Burlington Norther Railroad Company v. United Transportation Union*, 987 F.2d 784 (D.C. Cir. 1993) [attached to BN's Memorandum as Exhibit H; *cf.* UTU Memorandum, p. 5 *et seq.*; and UTU Exhibit 4, *Local 1389, UTU, et al. v. United Transportation Union and CSX Transportation, Inc.* Slip op. (E.D. Ky. Ashland Div. 1992)]. As demonstrated herein, however, Plaintiffs' reliance is upon the Court's recitation of the facts of the history of the dispute, rather than the characterization of the history as is set forth in Defendants' Memorandum or its officials' view of such history as set forth in the affidavits. Nevertheless, it appears to the Plaintiffs that this factual recitation of the D.C. Circuit, is a factual basis for understanding those matters which occurred in these cases prior to the Current Crew Consist Agreement at issue. [See First Amended Complaint, Paragraphs 61-69].

BN's position stresses its argument that this Court has no jurisdiction to revisit any issue laid to rest by Congress and the duly appointed Special Board. BN, as all defendants in these civil actions, however, mischaracterizes Plaintiffs complaints as being founded "out of their mandatory promotion to conductor" provision is a the "direct result of the implementation of PEB 219's recommendations as required by Congress." [BN Memorandum, p. 14; *cf.* Lead Plaintiff J. Smith's Affidavit, paragraph 5 in particular). As demonstrated *infra*, Plaintiffs', like UTU in *United Transportation Union v. United States of America, supra* did not necessarily like being forced into accepting promotion to the conductor title as mandated by the PEB 219 proceedings, but that dislike is *not* the gravamen of their Complaints before the Court. [Amended Complaint, Paragraphs 60-62]. Those proceedings did not mandate the content *all* of the terms of the Current Crew Consist Agreement or mandate that the

parties in their negotiations violate Plaintiffs' ADEA rights. (*Cook v. Pan American World Airways, Inc., supra.* PLS BN' Affidavits; Lead Plaintiff J. Smith's Affidavit; Amended Complaint, paragraphs 63-69).

Additionally, BN argues that the Railroad Labor Act preempts judicial review of Plaintiffs' ADEA claims since, "[i]n essence the present Plaintiffs are asking this court to reinstate their benefits upon prior labor agreements ..." (BN Memorandum, 15-18; *Cf. Robinson v. Transworld airlines, Inc., supra*). As demonstrated herein *infra*, this argument is not one that is supported by the facts advanced by the Plaintiffs. Nevertheless, in fashioning this argument, BN has attempted to "ring in" the U.S. Supreme Court's rationale in *Gilmer v. Interstate/Johnson Lane Corporation*, 111 S. Ct. 1647 (1991) which, as demonstrated *infra*, by its own language does not apply to this civil action. [BN memorandum, pp. 18-20] Thus, BN's position must be denied since it is neither factually nor legally supported. Finally, the attachments to the BN memorandum in Support of its motions are:

Exhibit A - Crew Consist Agreement Between BN and UTU, effective December 5, 1980.

Exhibit B - Memorandum of Agreement Between BN and UTU effective November 1, 1984

Exhibit C - Crew Consist Agreement Between BN and UTU effective October 25, 1991

Exhibit D - Executive Order 12714 of May 3, 1990, 55 FR 19047

Appendix E

Exhibit E - Report to the President of Emergency Board No. 219, January 15, 1991

Exhibit F - Public Law 102-29, 105 Stat. 169 (April 18, 1991)

Exhibit G - Report of the Special Board (102-29) Requests for Modification of the Report of Emergency Board No. 219, July 18 1991

Exhibit H - *United Transportation v. United States*, 987 F.2d 784 (D.C. Cir. 1993)

Exhibit I - Report of the Special Board (102-29) Interpretation and Clarification of the Report of Emergency Board No. 219, June 11, 1992

II.

PRIMA FACIE DISCRIMINATION ESTABLISHED FACTUALLY

The Plaintiffs in this case are all over forty years of age and have been working for their respective railroad for a number of decades. (PLS. BN Affidavits, generally at Paragraphs 1-3; PLS. UP Affidavits, generally at Paragraphs 1-3; BN Amended Complaint, Paragraphs 7-58; UP Amended Complaint Paragraphs 8-76. *Cf.* Hinckley Affidavit, Paragraph 5, p. 3, attached to the UP Memorandum; BN Memorandum at p. 4-6 and BN Exhibits "A" and "B") In each of their cases, it was more desirable for most of the Plaintiffs to retain their position as a brakeman in order to be assured of the better choice of runs, better pay and more control over one's work. (BN Amended Complaint, Paragraphs 59-60, and 63; PLS. BN Affidavits, generally at

Paragraphs 4-5; UP Amended Complaint, Paragraphs 78 and 81; PLS. UP Affidavits, generally at Paragraphs 4-5. *Cf.* Hinckley Affidavit, Paragraph 5, p. 3 *id.* October 23, 1993; BN Memorandum, *id.* and BN Exhibits "A" and "B"). Thus, the working conditions established by Defendants created a strong incentive not to advance, facts which are in some dispute by the Defendants.

The Defendants recognized these factors which resulted in the incentive not to advance by the maintenance of provisions in prior Crew Consist Agreements that those brakemen who chose to remain in the title would not have any later adverse affect upon their careers with the railroad. (PLS. BN Affidavits, generally in Paragraphs 4 and 5; BN Amended Complaint, Paragraphs 60 and 63; PLS. UP Affidavits, generally in Paragraphs 4 and 5; UP Amended Complaint, Paragraphs 78 and 81. *Cf.* Hinckley Affidavit, *id.*, and BN Exhibits "A" and "B"). The evidence, however, is mixed with respect to the operation of the prior Crew Consist Agreements since, not all of the Plaintiffs were in the same situation. Thus lead Plaintiff Jerome Smith points out in his Affidavit that as a result of actions taken years ago he was not allowed to promote prior to the Current Crew Consist Agreement after 1974. (Lead BN Plaintiff J. Smith Affidavit, Paragraph 4, p. 1). Nevertheless, it was apparently understood that the brakeman position was becoming obsolete, since the material and relevant prior Crew Consist Agreements contained provisions that promised that crew reduction would be made on a pure attrition basis. This promise was most recently reiterated in a 1985 agreement between the railroads and the Defendant union. (UP Amended Complaint, Paragraph 78; PLS. UP Affidavits, Paragraph 5; BN Amended Complaint, Paragraph 60; PLS. BN Affidavits, Paragraph 5; UTU Exhibit 1 Crew Consist Agreement of October 31, 1985. *Cf.* BN Memorandum, p 6; PEB No. 219 at

pp. 31 and 32, BN Exhibit "E"; UP Memorandum, p. 3, and Hinckley Affidavit, Paragraphs 9-12, pp. 4-6; UTU Exhibit 1.)

The railroads became impatient with the slow pace of attrition, the proceedings surrounding parties' respective Section 6 Notices, National Bargaining proposals, Presidential Executive Orders, PEB 19, threatened and executed strike activity by UTU, P.L.102-29, the Special Board and the Current Crew Consist Agreement were finalized. *United Transportation Union v. United States of America, supra.* It is only these Current Crew Consist Agreements and *not* the proceedings leading up to such agreements that forms the gravamen of Plaintiffs' Complaints. (UP Amended Complaint, Paragraphs 79-100; PLS. UP Affidavits, generally at Paragraph 6-10; BN Amended Complaint, Paragraphs 61-82; PLS. BN Affidavits, generally at Paragraphs 6-10; GE and Lead UP Plaintiff Hiatt's and Lead BN Plaintiff J. Smith's Affidavits, Paragraphs 5, 7-10). As demonstrated herein, neither proceedings prior to the negotiations for the new Crew Consist Agreement at issue nor the circumstances of the negotiations for the new Crew Consist Agreement warranted or mandated that the parties enter into an agreement violative of Plaintiffs' ADEA rights at issue. [Lead UP Plaintiff L. Hiatt, Lead BN Plaintiff J. Smith, and PLS. UP and PLS BN Affidavits).

According to the U.S. Equal Employment Opportunity Commission in Dallas, 58.25%, at a minimum, of employed brakemen on the Burlington Northern Railroad are in the protected age group. [PLS. BN Exhibit 1, p. 2] In the case of Defendant union Pacific, the Nebraska Equal Opportunity Commission reported that 68% of their brakemen are in the protected age group. (PLS. UP Exhibit 2, p. 20) These figures clearly included employees who held the position of brakeman

and, at the same time, also held the position of conductor. As demonstrated in the attached affidavits generally and of Messrs. Hiatt and Smith, specifically, these figures are on the low side for the Plaintiffs' civil action and claims of disparate impact because of that fact and that the statistics, after the record is fully developed on discovery, will show a greater disparate impact on those Plaintiffs and others similarly situated who had not become conductors in the past. (Lead BN Plaintiff Smith's and Lead UP Plaintiff Hiatt's Affidavits, Paragraph 6, p.2).

A.

PRIMA FACIE AGE DISCRIMINATION CASE PRESENTED

The Age Discrimination in Employment Act, 29 U.S.C. Section 621, *et seq.*, [hereafter, ADEA] prohibits discrimination based upon age if the victim is over forty years of age and the other criteria are met. Each of the Plaintiffs here are within the protected age group, and that fact is not disputed in the material supporting the motions. Although the ADEA is patterned after Title VII, 42 U.S.C. 20000e et seq, [hereafter, Title VII] certain portions incorporate provisions found in the Fair Labor Standards Act, 29 U.S.C. Section 216. Nevertheless, decisions interpreting the act usually look to Title VII cases. *See Branson v. Price River Coal Co.*, 853 F2d 768, 779 (10th Cir. 1988).

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) is the seminal case for the construction of the basic test for employment discrimination. There, the Court had before it a Title VII claim and not an ADEA claim. For a Title VII racial discrimination claim the test was simply stated: (1) is the plaintiff a member of a protected class; (2) did she/he apply for and was qualified for a particular job; (3) she/he was refused; and (4) the job went to an unprotected

employee or was held open for such employee's selection at a later date. *Id.* at 411 U.S. 802. This form of the test or any other such test was never intended to be rigidly applied and "did not purport to crate an inflexible formulation." *International Brotherhood of Teamsters v. United States*, 411 U.S. 324, 358, 97 S.Ct. 1843, 1866, 52 L.Ed.2d 396 (1977); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253-54, n. 6 (1981). The Court went on to assert that the test must be flexible in order to allow for differences among factual situations:

> The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to crate an inference that an employment decision was based on a discriminatory criterion illegal under the Act. *Id.*

In *McDonnell Douglas, supra*, the Court recognized that aggrieved employees rarely will able to uncover direct evidence of discrimination.[4] Thus, a formula was promulgated by which a plaintiff could use circumstantial evidence to prove discrimination. By proving that the most common legitimate explanation, *i.e.*, lack of qualifications, did not motivate the employer, the plaintiffs establish an inference of discrimination. *See Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978); *Cook v. Pan American World Airways, Inc., supra.*

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4. Here, as set forth in the attached affidavits, evidence of direct discrimination is also present.

Appendix E

B.

JOB ELIMINATION EVIDENCE NOT SUFFICIENT TO DEFEAT PRIMA FACIE CASE

Here, the facts of the decisions reached during the negotiations for the new Crew Consist Agreements at issue were that its objective was to eliminate the Brakeman job title and position; however, as demonstrated in all of the Affidavits of the Plaintiffs in both civil actions, and particularly the affidavit of lead Plaintiff Jerome J. Smith in the Burlington Northern Civil Action and Leonard Hiatt in the Union Pacific Civil Action (PLS. BN Affidavits; Lead BN Plaintiff Smith's Affidavit; PLS.UP Affidavits; and Lead UP Plaintiff Hiatt's Affidavit) work tasks of the Brakeman's title continue to be performed, but by employees who have a different title. Thus, in the Affidavits of Lead UP Plaintiff L. Hiatt and Lead BN Plaintiff J. Smith at paragraph 7, they demonstrate that the work each of them performed as a brakeman in the past continues to be performed by younger employees since the advent of the Current Crew Consist Agreement. Consequently, the Defendants' claims that the elimination of the brakeman job defeats Plaintiffs claims of discrimination are not factually supported by the work task performance evidence available at this early stage in this case. All of the attached Plaintiffs' affidavits in both Civil Actions demonstrate that there is a continuing need for the Plaintiffs' services and that among the work previously performed by them, among the available runs they used to work, and other duties described, such work continues to exist and in the main the better aspects of such work is now performed by the younger employees of the railroad. See for example, *Loeb v. Textron, Inc.*, 600 F.2d

1003 (1st cir. 1979);*Whitten v. Farmland Industries Inc.*, 759 F. Supp. 1522 (D.Kan. 1991)[5]

This case, of course, is akin to a reduction in force, but with an entire position being eliminated. Herein, the Plaintiffs range in age from their early forties to over sixty years of age and with, in some cases, more than forty years of employment with Defendant railroad. (UP Amended Complaint, Paragraphs 8-76; PLS. UP Affidavits, Paragraphs 1-3; BN Amended Complaint, Paragraphs 7-58; PLS. BN Affidavits, Paragraphs 1-3). As is clear from the attached (See all PLS. BN and PLS. UP Affidavits, generally; BN Lead Plaintiff Smith's Affidavit and Lead UP Plaintiff Hiatt's Affidavit specifically at Paragraph 8, and attached Seniority Rosters.) Defendants were aware of these facts. Indeed, as demonstrated *infra*, the carriers' bargaining proposals was designed to force this discrimination on the age protected employees. Moreover, the EEOC and the Nebraska EEO found that there was a prima facie case of discrimination presented by the Plaintiffs. (BN PLS. Exhibit 1; UP PLS. Exhibit 2: BN Lead Plaintiff Smith's and UP Lead Plaintiff Hiatt's Affidavits, Paragraph, 8).

Although not specifically addressed by the Defendants in their Memoranda, Plaintiffs nevertheless have met the *McDonnell Douglas*, *supra* and *International Brotherhood of Teamsters*, *supra* test at this juncture of the proceedings. Thus, Plaintiffs have carried their initial burden of offering evidence adequate to create an inference that an employment decision was

5. This case has similarities to the issues presented herein since there, as here, the protected group employees relied upon earlier assurances from the employer that certain protection would continue to be afforded to them. After such reliance, termination in face of the earlier promises resulted. An age discrimination claim was then commenced. *Whitten v. Farmland Industries, Inc.*, *supra*, at 1528-1529.

based on a discriminatory criterion illegal under the Act. *International Brotherhood of Teamsters v. United States*, *supra* at 411 U.S. 358. In addition, contrary to the implicit suggestion in Defendants arguments, this is not a case of first impression in the sense that it deals with the elimination of an entire classification. Thus, as is set forth in *Haimovitz v. United States Dep't. of Justice*, 720 F. Supp 516 (W.D. Pa. 1989), where the reduction in force does not result in a termination or demotion, but instead in the "elimination of an entire category of positions," the court fashioned the following *McDonnell Douglas* and *International Brotherhood of Teamsters* test: 1) that the plaintiff(s) "is a member of the protected class; 2) that he was qualified to assume another position at the time of the reassignments; 3) that he was adversely affected; and 4) that the employer had not treated age neutrally, but instead has discriminated based upon." *Haimovitz v. United States Dep't. of Justice*, *supra*, at 720 F. Supp. 524.

In *Haimovitz*, of course, the Plaintiff was separated from the payroll whereas here, the Plaintiffs continue to be in the railroad's employ. Thus, construing these cases' requirements to matters presented, Plaintiffs respectively urge the Court to fashion the following test herein until at least the record of evidence is documented through the discovery process and response pleadings by the Defendants: 1) are Plaintiffs in the protected age group? 2) were they adversely affected by the Defendants' employment decisions; and 3) with the reduction in force executed in a manner which discriminated against older employees by affecting age protected employees more harshly than younger employees. This test is patterned on the above authorities with emphasis on the Tenth Circuit's *Branson v. Price River Coal Co.*, *supra's* test and merely eliminating the element that the Plaintiffs were qualified for the conductor positions since this reduction in force makes such element moot. Thus, under the leading authorities, plaintiffs have established a *prima facie* case.

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Moreover, the statistical evidence presently available and the affidavits of Messrs. Hiatt and Smith and all other PLS, BN and UP Affidavits demonstrate age bias and, as is the case in many circuits, the fact that younger employees are retained in positions where older employees were either forced to leave their jobs or perform less desirable work and tasks demonstrates the age bias element in Plaintiffs' case. Indeed, *Beck v. QuikTrip Corp.*, 708 F.2d 532 (10th Cir. 1983) supports the use of statistics in cases of this nature in this Circuit. The statistical information provided by the Defendants to the EEO agencies, was not the correct statistical sample since the main evidence presented herein is that most, if not all, of the Plaintiffs had not been offered or accepted an offer to the Conductor title prior to the Current Crew Consist Agreements issue. The figures provided to the administrative agencies were, it is believed by Plaintiffs, to be of a mixed variety, *i.e.*, employees holding the brakeman title and the conductor title at the same time. (BN Lead Plaintiff and UP Lead Plaintiff Affidavits, *id.*) The evidence herein will demonstrate, however, that the more correct statistical sample should be of brakemen who held no conductor title. (Lead UP Plaintiff Hiatt & Lean BN Plaintiff Smith Affidavits).

As the Supreme Court has held, "Every *individual* employee is protected against both discriminatory treatment and 'practices that are fair in form but discriminatory in operation.'" *Connecticut v. Teal*, 457 U.S. 440, 102 S. Ct. 2525, 2535, 73 L.Ed.2d 130 (1982) [emphasis in original, citation omitted] The Defendants decisions subsequent to the Special Board's action in negotiating new Crew Consist Agreements at issue do not even facially appear to be based upon prior governmental action under the RLA and on a fair criterion. Their operation was discriminatory and Plaintiffs are protected from such discrimination by the ADEA. (*Cook v. Pan American World Airways, Inc., supra*).

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C.

Alternatively, This Is a Case of Mixed-Motive Discrimination

Defendants claim age is not the basis for their personnel and employment actions at issue. Plaintiffs respectfully submit that the personnel and employment issues presented may,[6] alternatively, be for such stated reasons and the ADEA raised by Plaintiffs. The Supreme Court has recognized such "mixed motive" cases of discrimination. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 1791, 104 L.Ed.2d 268 (1989). Mixed motive cases, as their names indicate, are personnel actions in which more than one factor influences the action. One of the motives can be a legitimate business concern.

The Tenth Circuit has held:

> [In] mixed motive cases, the plaintiff is entitled to some remedy once the discriminatory practice has been proved, even though the employer has established that the same decision would have been made, absent the discrimination.
> *EEOC v. General Lines, Inc.*, 865 F.2d 1555, 1560 (10th Cir., 1989)

While Plaintiffs explicitly denies that the Defendants have established in the Memorandum attachments and exhibits that the ADEA decisions would have been made absent the

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6. There have been no answers filed and no discovery undertaken in this case; thus, certain questions on motivation require discovery responses; nevertheless, the "mixed-motive" rationale may be present given the legal positions advanced by Defendants.

discrimination complained of,[7] Plaintiffs submit that they still have established sufficient evidence to establish the discriminatory practices.

III.

SUMMARY JUDGMENT OR DISMISSAL IS NOT AVAILABLE

A motion for summary judgment should be granted only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The initial burden is on the movant to show "that these is absence of evidence to support the non-movant's case." *Celotex, supra*, 477 U.S. at 325, 106 S.Ct. at 2554. In making this valuation, pleadings and documentary evidence are to be construed liberally and in favor the party opposing the motion. *Florom v. Elliott Mfg.*, 867 F.2d 570 (10 Cir. 1989). Disputes over facts that might affect the outcome of the suit under governing will, of course, properly preclude entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

The railroad Defendants herein urge that this matter be resolved in their favor by summary judgment since, in the words of UP, the "face of the complaint reveals an insuperable bar to relief." Additionally, since UP submitted matters outside the pleadings, it specifically urges that "this motion is properly treated as one for summary judgment and disposed of pursuant to Fed. R. Civ. P. 56." (UP Memorandum pp 1-2) BN argues that the

7. Including some evidence of direct age discrimination as demonstrated in the affidavits of Leading Plaintiffs Hiatt and Smith and others in both civil actions.

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Amended Complaint fails "to allege a prima facie case that age was in any way a factor in developing the Current Crew Consist Agreement, or that any alleged disparate impact therefrom was intentionally or arbitrarily designed to impose an age based burden upon them" (BN Memorandum, p. 3) Fairly viewed, however, after stripping out the fat, the essence of the railroad defendants position is that summary judgment or dismissal must enter since the employer did not violate the ADEA but merely relied upon the mandates of the law of the United States that was properly enacted under the Commerce Clause of the United States Constitution and that in such compliance, they cannot be held liable for doing that which the Congress and president directed in P.L. 102-29. This position is not supported by the cases cited herein generally and *Cook v. Pan American World Airways, Inc., supra*, specifically.

Defendant UTU, in the Union Pacific lawsuit, primarily plays the same tune but really casts it lot in claiming that the Plaintiffs ADEA suit is a disguised effort to bring a breach of the duty of fair representation suit and such claim is meritless by virtue of *Local 1389, United States Transportation Union v. United Transportation Union, et al., supra*. (UTU/UP Exhibit 4; UTU/UP Memorandum, pp. 6-9). Both the UTU in the Union Pacific lawsuit and BN in its lawsuit also advance an arbitration argument in support of their allegation that this court is without subject matter jurisdiction. (*Cf. Robinson v. Transworld Airlines, Inc., supra*)

Plaintiffs have demonstrated, *supra*, that they have in fact established a prima facie case under the mandates of the ADEA. Is this prima facie case defeated by the arguments that all the Defendants were doing was complying with federal law? Of course not. A careful examination of Defendants arguments in

this connection defeat themselves with their own evidence. The mere fact that attrition was to get rid of the brakemen by the 21st century (less than seven years from now) underscores the parties' knowledge concerning age of the Brakemen. Moreover, the attached affidavits demonstrate that at the very least there exists a substantial number of material facts which are in good faith controverted regarding the available subjects for negotiations on the crew consist issue in dispute, after the Special Board Report (219). Fed. R. Civ. P. 56(d)

We conducted a careful review of the legislative history behind P.L. 102-29. We have examined the debates in both the Senate and House of Representatives by reference to the Congressional Record, Vol. 137, No. 56, April 17, 1991, S-4657, et seq. and H-2363, et seq. We have examined President Bush's comments on the occasion of his execution of Public Law 102-29, U.S. Code and Cong. & Admin. News, Vol. 2, p. 99 (1991). There is nothing in the legislative history which defeats the ADEA position advanced by these Plaintiffs in these civil actions. Defendants cannot successfully stand upon the proposition that compliance with the P.L. 102-29 authorized discrimination at issue. *Cook v. Pan American World Airways, Inc., supra*, in particular underscores this entitlement of Plaintiffs to proceed with their ADEA suit in face of the Defendants' position on this point.

The PEB references relied upon by Defendants are silent on the age discrimination raised herein. Plaintiffs' affidavits in both civil actions attached hereto demonstrate that both the UTU and the respective railroad Defendant "knew that without some further provision in the agreement" they were negotiating subsequent to the Special Board the crew consist agreement "would have a disparate impact on Brakemen over 40 years of age." [BN PLS. and UP PLS. Affidavits, Paragraph 6, p. 2)

Moreover, Plaintiffs have produced no evidence to contradict Plaintiffs' position that "[t]here was no attempt by the BRRC [UPRC] or the UTU to preserve" the older employees' who had held the title of Brakeman "years of service . . . when the Current Crew Consist Agreement was implemented by dove tailing (sic) with other employees my years of service or otherwise distributing the burden of having to work the longer hours and performing more physically demanding work causing" the damages described by the Plaintiffs. (*Id.*, Paragraph 7)

What evidence have Defendants produced that provides that Congress or the PEB proceedings mandated that there be no effort to not discriminate against the older employees in effecting the mandatory promotion and to negotiate the crew consist issue even in face of alleged moratoriums against such negotiation at the material times at issue? No such evidence has been produced by Defendants because no such evidence exists. BN, but not the UTU in its Memorandums boldly states, but provides no evidence to support the statement, that UTU argued "to PEB 219 that brakemen should retain the discretion . . . to accept or reject promotion offer and retain their brakemen seniority, rather than become conductors and a matter of industry practice go to the bottom of the seniority list." (BN Memorandum, p. 12] No evidence was produced support this statement. But even if such evidence somehow exists, that statement is not sufficient to defeat the discrimination issues presented. The PEB did not require that in implementing the crew consist negotiations after lifting of the moratoriums, that the parties must include in such agreement that brakeman forced into promotion *had* to go to the bottom of the seniority roster. The PED did not prohibit dovetailing or evenly distributing the work or hours of work. Neither the PEB nor any agency associated with P.L. 102-29 tied the hands of the negotiators in resolving the crew consist issue in

a manner designed to avoid violation of the ADEA and the discrimination presented by the evidence of the Plaintiffs herein. The evidence in fact is that the PEB and the following legal proceedings prior to the parties negotiations never set any limits on how or the mechanism for the execution of the mandatory promotion requirement. Thus, the parties were free to agree to the dovetailing of seniority or the development of a mechanism to distribute the burden of having to work the longer hours and performing the more physically demanding work amongst all of the employees and not just the aged or some other device to avoid the aged discrimination presented. It was the Defendants and no one else who the decision to effect the complained of discrimination. They were not free to enter into such agreements by any mechanism of the Railway Labor Act. *Cook v. Pan American World Airways, Inc., supra*; *Robinson v. Transworld Airlines, Inc., supra.*

As announced in *Connecticut v. Teal, supra*, "Congress never intended to give an employer license to discriminate against some employees" merely because "he favorably treats other members of the employee group." (*Id.*, at 102 S.Ct. 2535). Moreover, as it relates to UTU in Union Pacific lawsuit it is jointly and severally liable:

> . . . the ADEA expressly prohibits unions, not just employers, from causing or attempting to an employer to engage in unlawful discrimination under section 623(c)(3) of the ADEA . . . . When a union becomes a party to a discriminatory provision in a collective bargaining agreement binding the employer to an unlawful practice, the union's conduct is aiding and abetting the employer to discriminate against employees

> renders it independently liable for violation of the ADEA (citations omitted) *Air Line Pilots Ass'n. v. Trans World Airline*, 713 F.2d 940, 951 (2nd Cir. 1983).

Thus, "the terms of any collective-bargaining agreement must comply with the federal law that prohibits discrimination". *United Mine Workers of America v. Robinson*, 455 U.S. 560, 575; 102 S.Ct. 1226, 1234; 71 L.Ed.2d 419 (1982).

Where federal statutory rights are involved in the area of discrimination, the courts will protect those rights afforded by Congress even in face of the provisions of a collective bargaining agreement. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48; 94 S.Ct. 1011, 1019-1020, 36 L.Ed.2d 147 (1974); *U.S.E.E.O.C. v. County of Calumet*, 686 F.2d 1249 (7th Cir. 1982) (A union may not "sacrifice the rights of individual members near retirement age in order to better the common good of the membership.")

The provisions of a collective bargaining agreement that do not comply with the federal law that prohibits discrimination in an industry regulated by the Railway Labor Act, presents for resolution a federally protected right which this Court has subject matter jurisdiction to resolve. (*Airline Pilots Ass'n. v. Trans World Airline, supra*; *E.E.O.C. v. Airlines Pilots Ass'n.*. 489 F.Supp. 1003 (D. Minn., 1980), rev'd. on other grounds, 66 F.2d 90 (8th Cir. 1981)). There is no basis for this Court to conclude that since the provision which is the subject matter of the discrimination at issue is in a collective bargaining agreement, Plaintiffs must submit their dispute to arbitration.

BN, however, further argues that if this Court should conclude that arbitration is not mandated by the Railway Labor

Act's minor dispute and major dispute provisions then arbitration is mandated by *Gilmer v. Interstate/Johnson Lane Corp.*, U.S., 111 S.Ct. 1647 (1991). (BN Memorandum, pp. 18-20). *Gilmer*, however, is factually and legally distinguishable from the issues presented herein and did not address arbitration and discrimination where the issue is presented by the collective bargaining agreement. In *Gilmer*, the Court neither overruled *Alexander v. Gardner-Denver, supra*, nor believed it applied to the facts presented. The Court commented:

> . . . In holding [in *Alexander v. Gardner-Denver*] that the employee was not foreclosed from bringing the Title VII claim, we stressed that an employee's contractual rights under a collective bargaining agreement are distinct from the employees's statutory Title VII rights. *Gilmer, id.* at 111 S.Ct. 1656.

In face of the Court's pronouncements in *Connecticut v. Teal, supra*, and its progeny, it is clear the Court does not intend for *Alexander v. Gardner-Denver* rule to overruled in the federal discrimination litigation since the Court expressly recognized that the "arbitrator's 'task is to effectuate the intent of the parties' and he or she does not have the 'general authority to invoke public laws that conflict with the bargain between the parties.' (Citing *Gardner-Denver, supra* 415 U.S. at 53). *Gilmer v. Interstate/Johnson Lance Corp.*, supra at 111 S.Ct. 1656. Of course, that is the precise issue presented herein and neither the Plaintiffs, this Court nor anyone else can expect that a minor disputes arbitration proceeding under the Railway Labor Act would have the authority to enforceably disregard the agreement at issue and apply the ADEA as the Plaintiffs have demonstrated is required to remedy the discrimination at issue. Plaintiffs have

never agreed or has the Railway Labor Act mandated their agreement to submit their ADEA claims to Arbitration under the minor disputes provisions of that act. Moreover, Congress has not exempted the railway industry from administration of the ADEA through the judiciary and no court has so interpreted either act to so conclude. In this connection, the statements of the Second Circuit in *Cook v. Pan American World Airways, Inc., supra*, at 771 F.2d 640-642 underscore the significance of the *Gilmer* Court's comment at 111 S.Ct. 1656-1657 demonstrating an intent to continue in the collective bargaining environment the *Alexander v. Gardner-Denver* rule.

For all of these reasons, all motions should be dismissed and Defendants directed to file their answer within a reasonable period of time.

Respectfully submitted,

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Appendix E

CERTIFICATE OF MAILING

I hereby certify that on this 25th day of October, 1993, I placed a true and correct copy of the foregoing Combined Response in Opposition to Defendants Motions to Dismiss or, in the Alternative, for Some Defendants, For Summary Judgement in the United States Mail, first class postage prepaid and properly affixed addressed to:

Kevin C. Brodar, Esq.
Associate General Counsel
United Transportation Union
14600 Detroit Avenue
Cleveland, Ohio 44107

Robert G. Pickering, Esq.
Bailey, Pickering & Stock
221 East 21st Street
P.O. Box 1557
Cheyenne, Wyoming 82001

John B. Rogers, Esq.
ROGERS, BLYTHE, LEWIS
122 East 17th Street
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Kathleen J. Ford, Esq.
Union Pacific Railroad Company
1416 Dodge Street, Room 830
Omaha, Nebraska 68179

Appendix E

George E. Powers, Jr., Esq.
Raymond W. Martin
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Cheyenne, WY 82003-0328

Lawrence M. Stroik, Esq.
Burlington Northern Railroad Company
3800 Continental Plaza
777 Main Street
Fort Worth, TX 76102

s/ illegible

Appendix E

EXHIBIT — DETERMINATION OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, DALLAS DISTRICT OFFICE DATED APRIL 19, 1993

[Omitted here but printed at pp. 59a-63a.]

Appendix E

EXHIBIT — DETERMINATION OF THE NEBRASKA EQUAL OPPORTUNITY COMMISSION FILED APRIL 16, 1993

[Omitted here but printed at pp. 64a-90a]

Appendix E

AFFIDAVITS FOR UNION PACIFIC PLAINTIFFS

Appendix E

EXHIBIT — AFFIDAVIT OF LEONARD K. HIATT, LEAD PLAINTIFF, DATED OCTOBER 23, 1993

Richard Rideout, Esq.
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SALZBURG, BONDS & RIDEOUT, P.C.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF LEONARD K. HIATT

I, LEONARD K. HIATT, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 7/12/37, I am 56 years of age.

3. I began employment with UPRC on 8/29/55.

4. For the vast majority of my 38 years of employment with UPRC I worked as a Brakeman. I chose to remain a Brakeman during these years because I felt it was to my benefit to remain a Brakeman. I was a young man with a family to support I could best do this by remaining in a Brakeman position. My service time in the Brakeman craft allowed me to work the higher compensated jobs and regular pool turns, jobs which benefited my family not only financially but also provided me with more time to be with them.

5. I feel that my ADEA rights were violated, not by PEB 219 as the UPRC and the United Transportation Union would have everyone to believe, but by the Carrier and the Union in their negotiations for the Current Crew Consist Agreement. It was not the fact that it became necessary for all of us to become promoted Conductors, but the fact that the UPRC and the UTU decided to stick their heads in the sand and disregard all the years of service that myself, other plaintiffs, and other older workers had. They refused to consider the fact, in the new Crew Consist Agreement that younger promoted Conductors with far less years of service were going to be doing my job while I in turn would be forced to

do the work younger men had always performed, work I did when I first hired out on the railroad.

6. The UPRC furnished the Nebraska Equal Opportunity Commission a figure of 68% for the percentage of men over 40 who were disparately impacted by the Current Crew Consist Agreement. This does not represent a true picture as the UPRC in calculating this percentage also counted promoted Conductors who were still working Brakeman positions (if these promoted Conductors were still working Brakeman positions then it would be accurate to believe they are younger men, not only in years of service but also in age). If these younger promoted Conductors were deleted from these figures you would see a far greater percentage of men in the protected age group, who were disparately impacted by this Agreement than the 68% quoted by the UPRC.

7. Although, the job title of Brakeman was eliminated the work was not. The work performed by the Brakeman is still being done it is just being done by Conductors. They started to accomplish this in the mid-1980's (as stated by Mr. W. Scott Hinckley in his Affidavit In Support Of Defendant UPRC Motion To dismiss, page #4 Item #9) (see exhibit F). Mr. Hinckley stated "And by the mid-1980's, automated train control made rear-end flagging unnecessary in many instances, and cabooses could be replaced with automatic end-of-train devices. In consequence, there was no need for crew members at the rear of the train, and as cabooses were eliminated, the two crew members at the rear-end migrated to the head-end. where three employees then shared the work that formerly was done by a single head-end trainman." The two crew members Mr. Hinckley speaks of at the rear-end were in fact 1 Brakeman and 1 Conductor however the "head-end trainman" he speaks of was a Brakeman so in essence a

Appendix E

Conductor was brought from the rear-end of the train to do Brakeman work at the head-end.

8. As you can see from the attached seniority rosters, as a Brakeman I was number 3 on the Brakeman's roster as a conductor I am number 162 on the Conductor's roster, the other plaintiffs in the lawsuit have been similarly effected. Based on the seniority rosters alone it would have been impossible for the UTU and UPRC to not have known, from the onset their actions was going to create a disparate impact on the older protected employees ie: age discrimination.

9. I am now required to perform physically demanding work during undesirable hours: work I once did when I initially began with the railroad. I am currently working a job that I have not worked since 1962. I can only hold this type of position, an extra board position, or a local (I have not worked on the extra board or a local since 1968). I will never again be able to hold a regular road job because these positions are being held by younger promoted men whose retirement will come long after mine. I feel that the above, without a doubt, shows age bias.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered severe economic and personal damages including marital problems such as threats of divorce by my wife, loss of companionship of my wife and visits to marriage counselors. Her mental health has been severely effected by the drastic change in our lifestyle caused by the Current Crew Consist Agreement. I have been hospitalized for ulcers, I have had to take medication for nerves, and I was hospitalized recently with chest pains, all caused by stress which was created by the latest Crew Consist Agreement. My invalid son's lifestyle has been disrupted by my

not being able to be home on a regular basis to assist with his care, this to has put added stress on my wife.

11. Since these proceedings were initiated at the EEO level for both this case and the Burlington Northern charges of discrimination. I have had life threatening remarks by phone and in person. M. S. McConahay, Secretary UTU local lodge 200, a UTU officer threatened me over the phone. My wife has also received threatening phone calls which created such problems that we were advised by the sheriff's office to have a phone tap installed by the phone company and to buy an expensive phone recording device which records all incoming phone numbers and conversations. While at work I am continually harassed by younger employees telling me I am trying to take their jobs away from them, jobs which in fact were mine and other named plaintiffs. I have been called a scab, a low life SOB and many other colorful titles. I was told three weeks ago by a Conductor, L. G. Seiler, that they were going to take up five hundred dollar donations from conductors to me bumped off if I persisted in continuing this lawsuit. Remarks have been made to me that "we older guys should just take the buy-out and quit".

Dated this 23 day of October, 1993.

By: s/ Leonard K. Hiatt
LEONARD K. HIATT

STATE OF Nebraska)
)
COUNTY OF Lincoln)

Appendix E

Subscribed and sworn to before me by Leonard K. Hiatt, this 23 day of October, 1993.

Witness my hand and official seal.

s/ Larry D. Schnell
Notary Public

[SEAL]

Appendix E

EXHIBIT — SENIORITY ROSTERS ANNEXED TO FOREGOING AFFIDAVIT OF LEONARD K. HIATT

[Omitted here but printed separately as Lodging Appendix.]

Mr. Hiatt's position now through last negotiation is #159.

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EXHIBIT — AFFIDAVIT OF MARVIN L. CRABAUGH DATED OCTOBER 23, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

AFFIDAVIT OF MARVIN L. CRABAUGH

Appendix E

I, MARVIN L. CRABAUGH, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 11/3/39, I am 53 years of age.

3. I began employment with UPRC on 7/28/58.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work. It was not to may advantage to take promotion at this time.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as Brakemen was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman, I became a Conductor and was forced to give up the corresponding benefits

of my years of service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours: work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages including health problems.

11. My position has been eliminated as a result of the Current Crew Consist Agreement however, the work task of the Brakeman Title continues to be performed by employees who have a different title.

Dated this 23 day of October, 1993.

By: s/ Marvin L. Crabaugh
MARVIN L. CRABAUGH

Appendix E

STATE OF Kansas)
)
COUNTY OF Johnson)

Subscribed and sworn to before me by Marvin L. Crabaugh, this 23rd day of October, 1993.

Witness my hand and official seal.

s/ Suzan Bryant
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF CARL D. HOUK DATED OCTOBER 23, 1993

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

AFFIDAVIT OF CARL D. HOUK

Appendix E

I, CARL D. HOUK, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 11/26/36, I am 56 years of age.

3. I began employment with UPRC on 10/21/58.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work. It was not to may advantage to take promotion at this time.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as Brakemen was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman, I was forced to give up the corresponding benefits of my years of service as a

Appendix E

Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours: work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages including health problems.

11. My position has been eliminated as a result of the Current Crew Consist Agreement however, the work task of the Brakeman Title continues to be performed by employees who have a different title.

12. Statements have been made to me by co-workers implying that I am no longer wanted and I should just retire.

Dated this 23 day of October, 1993.

Appendix E

By: s/ Carl D. Houk
CARL D. HOUK

STATE OF Kansas)
)
COUNTY OF Johnson)

Subscribed and sworn to before me by Carl D. Houk, this 23rd day of October, 1993.

Witness my hand and official seal.

s/ Martha L. Cansler
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF JEROLD B. HUTCHINGS DATED OCTOBER 23, 1993

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

AFFIDAVIT OF JEROLD B. HUTCHINGS

Appendix E

I, JEROLD B. HUTCHINGS, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 3/10/43, I am 50 years of age.

3. I began employment with UPRC on 6/61.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work. It was not to my advantage to take promotion at this time.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as Brakemen was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman, I became a Conductor and was forced to give up the corresponding benefits

of my years of service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours (I am working the extra board and am gone from home as long as seven days at a time sometimes without prior knowledge that I will be gone that long).; work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages .

11. My position has been eliminated as a result of the Current Crew Consist Agreement however, the work task of the Brakeman Title continues to be performed by employees who have a different title.

Dated this 22 day of October, 1993.

By: s/ Jerold B. Hutchings
JEROLD B. HUTCHINGS

Appendix E

STATE OF Kansas)
)
COUNTY OF illegible)

Subscribed and sworn to before me by Jerold B. Hutchings, this 22nd day of October, 1993.

Witness my hand and official seal.

s/ Kristen G. Smith
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF STEPHEN J. MILLER DATED OCTOBER 22, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

AFFIDAVIT OF STEPHEN J. MILLER

Appendix E

I, STEPHEN J. MILLER, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 7/4/38, I am 55 years of age.

3. I began employment with UPRC on 11/28/58.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work. It was not to may advantage to take promotion at this time.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as Brakemen was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman, I became a Conductor and was forced to give up the corresponding benefits

Appendix E

of my years of service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours: work I once did when I initially began work with the railroad. I am now off work with an injury that I got while performing the type of work that I did when I initially hired on with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages including health problems.

11. My position has been eliminated as a result of the Current Crew Consist Agreement however, the work task of the Brakeman Title continues to be performed by employees who have a different title.

Dated this 22 day of October, 1993.

By: s/ Stephen J. Miller
STEPHEN J. MILLER

Appendix E

STATE OF Kansas)
)
COUNTY OF illegible)

Subscribed and sworn to before me by Stephen J. Miller, this 22nd day of October, 1993.

Witness my hand and official seal.

s/ Kristen G. Smith
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF KIM R. HARDMAN DATED OCTOBER 22, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

AFFIDAVIT OF KIM R. HARDMAN

Appendix E

I, KIM R. HARDMAN, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 12/19/52, I am 40 years of age.

3. I began employment with UPRC on 3/1/73.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work. It was not to may advantage to take promotion at this time.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as Brakemen was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman, I became a Conductor and was forced to give up the corresponding benefits

of my years of service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours: work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages including health problems.

11. My position has been eliminated as a result of the Current Crew Consist Agreement however, the work task of the Brakeman Title continues to be performed by employees who have a different title.

12. Remarks have been made by a fellow employee "I'm not worth a damn".

Dated this 22 day of October, 1993.

Appendix E

By: s/ Kim R. Hardman
KIM R. HARDMAN

STATE OF Kansas)
)
COUNTY OF Marshall)

Subscribed and sworn to before me by Kim R. Hardman, this 22nd day of October, 1993.

Witness my hand and official seal.

s/ Jean M. Prerking
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF KENNETH R. COVINGTON DATED OCTOBER 22, 1993

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF KENNETH R. COVINGTON

I, KENNETH R. COVINGTON, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 4/1/52, I am 41 years of age.

3. I began employment with UPRC on 6/7/73.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work. It was not to may advantage to take promotion at this time.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as Brakemen was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist

Appendix E

Agreement, eliminated my position as a Brakeman. I became a Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours: work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages including health problems.

11. My position has been eliminated as a result of the Current Crew Consist Agreement however, the work task of the Brakeman Title continues to be performed by employees who have a different title.

Dated this 22 day of October, 1993.

By: s/ Kenneth R. Covington
KENNETH R. COVINGTON

Appendix E

STATE OF NEBRASKA)
)
COUNTY OF LINCOLN)

Subscribed and sworn to before me by Kenneth R. Covington, this 22 day of October, 1993.

Witness my hand and official seal.

s/ Brenda J. Luebbe
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF LARRY R. MANN DATED OCTOBER 22, 1993

Richard Rideout, Esq.
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LAW OFFICES OF JOHN W. McKENDREE
1244 Grant Street
Denver, Colorado 80203
(303) 861-8906

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF LARRY R. MANN

I, LARRY R. MANN, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 10/28/39, I am 53 years of age.

3. I began employment with UPRC on 11/8/58.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work. It was not to my advantage to take promotion at this time.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as Brakemen was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist

Appendix E

Agreement, eliminated my position as a Brakeman. I became a Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs and select better hours and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours: work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages.

11. My position has been eliminated as a result of the Current Crew Consist Agreement however, the work task of the Brakeman Title continues to be performed by employees who have a different title.

12. Statement have been made to me by co-workers implying WE WERE NO LONGER NEEDED.

Dated this 22 day of October, 1993.

Appendix E

By: s/ Larry R. Mann
LARRY R. MANN

STATE OF Kansas)
)
COUNTY OF illegible)

Subscribed and sworn to before me by Larry R. Mann, this 22 day of October, 1993.

Witness my hand and official seal.

s/ Kristen G. Smith
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF MAURICE F. MCDONALD DATED OCTOBER 24, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et. al.,

Plaintiffs,

vs.

UNION PACIFIC RAILROAD COMPANY, A Utah Corporation and UNITED TRANSPORTATION UNION,

Defendants.

AFFIDAVIT OF MAURICE F. MCDONALD

STATE OF NEBRASKA)
) ss.
COUNTY OF DOUGLAS)

I, MAURICE F. McDONALD, being first duly sworn upon oath, do state and depose as follows:

1. I am an employee of the Union Pacific Railroad Company, hereinafter referred to as "UPRC".

2. My date of birth is December 26, 1941, and I am 51 years of age.

Appendix E

3. I began my employment with Union Pacific Railroad on July 17, 1963.

4. For the last several years of my employment with the UPRC, I was a Brakeman. I was satisfied being a Brakeman, and did not seek the job of Conductor, which would have been a promotion for me. I felt that it would not be to my advantage to take a promotion to Conductor, giving up all the seniority related advantages that I enjoyed as a Brakeman.

5. I relied upon the prior promises in the Crew Consist Agreement, promising me that any crew reductions would be based solely on attrition, so I felt that my position as a Brakeman would be secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. Due to the manner in which hire out dates and seniority policies of the UPRC are implemented in job bidding, both the railroad and the UTU knew that without some further provision in the agreement, it would have a disparate impact on the Brakemen over 40 years of age, who were obviously those with earlier seniority dates that were now being negated.

7. When the implementation of the current Crew Consist Agreement eliminated my position as a Brakeman, I was forced to give up many advantages of my 30 years of seniority for purposes of job bidding. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the current Crew Consist Agreement was implemented by dovetailing with other employees my years of seniority as had been done when the UPRC brought in some displaced switchmen

during UPRC's merger with the Missouri Pacific Railroad. These displaced employees were able to retain as their only seniority date their braking dates. Their conductor's dates became their braking dates as well.

8. Younger employees with less years of service than I have, who hired out with the railroad much later than I did, are now able to bid on and hold the jobs that I once worked. Despite the fact that I have served as a yard engine foreman (the same job as the current conductor performs) for a period of 20 years, I must now take a seniority date only two years old to do that same job on the road.

I have had several of the younger employees, who now hold the more advantageous jobs that I used to be able to hold tell me, "You should have hired out sooner". I have replied, "I did hire out sooner — I was switching boxcars with this railroad before you were born!" Unfortunately, my new seniority date puts me in the position of serving these younger employees as a helper. It is not pleasant.

9. As a result of the implementation of the current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered psychological, economical and personal damages.

10. My position has been eliminated as a result of the current Crew Consist Agreement, however the work tasks of the Brakemen are being performed by the Conductor (a position I held under the title of Yard Engine Foreman doing the same tasks for the past 20 years). Despite the fact that I have paid dues to the union who was supposed to be representing my interests at all in the last contract negotiations. If only 500 Brakemen were affected by this new Crew Consist Agreement as I have heard,

why were approximately 2,500 ballots cast? In addition, our local union representatives were either younger men or older men ready to retire, who would be personally enhanced by discriminating against employees over 40 to benefit their own seniority positions or have additional funds for retirement since they would soon be leaving anyway. In 1964 or 1965, there was a Court case that tested the Crew Consist agreements in the state of Nebraska. I cannot remember it's name, but I do remember that I was the youngest protected employee on the Boards in my area.

11. The local work agreements were renegotiated this summer, to exclude the Brakemen from taking temporary Conductor's positions as had been the practice in the past. The local work agreements have also been renegotiated recently to allow Conductors to exercise their braking seniority date, further negating my seniority.

s/ Maurice F. McDonald
Maurice F. McDonald

Subscribed and sworn to before me this 24 day of October, 1993 by the said Maurice F. McDonald.

s/ Jill M. Langle
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF DONALD A. RASCHKE DATED OCTOBER 24, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et. al.,

Plaintiffs,

vs.

UNION PACIFIC RAILROAD COMPANY, A Utah Corporation and UNITED TRANSPORTATION UNION,

Defendants.

AFFIDAVIT OF DONALD A. RASCHKE

STATE OF NEBRASKA)
) ss.
COUNTY OF DOUGLAS)

I, DONALD A. RASCHKE, being first duly sworn upon oath, do state and depose as follows:

1. I am an employee of the Union Pacific Railroad Company, hereinafter referred to as "UPRC".

2. My date of birth is December 18, 1936, and I am 56 years of age.

Appendix E

3. I began my employment with Union Pacific Railroad on July 30, 1970.

4. For the last several years of my employment with the UPRC, I was a Brakeman. I was never offered the chance to be promoted to Conductor until the latest Crew Consist Agreement eliminated the Brakeman positions.

5. I relied upon the prior promises in the Crew Consist Agreements, promising me that any crew reductions would be based solely on attrition, so I felt that my position as a Brakeman would be secure until my retirement or until I otherwise left the railroad.

6. The current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. Due to the manner in which hire out dates and seniority policies of the UPRC are implemented in job bidding, both the railroad and the UTU knew that without some further provision in the agreement, it would have a disparate impact on the Brakemen over 40 years of age, who were obviously those with earlier seniority dates that were now being negated. In fact the buy out agreements offered to us by the railroad were based on seniority, to make it a much more attractive enticement for older employees to leave.

7. When the implementation of the current Crew Consist Agreement eliminated my position as a Brakeman, I was forced to give up many advantages of my several years of seniority. There was no attempt by the UPRC or the UTU to preserve my years of seniority, as had been done when the Union Pacific Railroad and the Missouri Pacific Railroad merged and employees were displaced.

8. Younger employees with less years of service than I now have, who hired out with the railroad much later than I did, are now able to bid on and hold the jobs that I once worked. Despite the fact that I have served as a yard engine foreman (the same job as the current conductor performs) for a period of 30 years, I must now take a seniority date only two years old to do that same job on the road.

9. As a result of the implementation of the current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered psychological, personal and economic damages. My income has dropped about 25% to 30% this year, despite the fact that I have been required to work quite a few hours of overtime on my new job. I am not able to spend much time with my family, as I have enjoyed doing in the past.

In 1986, I fractured my left leg in two places while I was working on the railroad. Now that I am forced to work this much overtime, I am on my feet more now than I have ever been in the past, and I am having pain in my previously fractured leg from the increased physical demands of my new position. I have been taking Feldene for my leg, which helps to relieve some of the pain and inflammation, however, whenever my leg is bothering me too much, I will lay off of work for that day. I recently received a letter from the railroad stating that I was laying off too much and was in danger of losing my job. While I could hold a position on the Brakeman's Extra Board, which would allow me to earn more money than my job in the yards, my former Brakemen colleagues working that extra board tell me they are often working every other eight hours, and I know my previously injured leg could never stand those kind of hours.

10. My position has been eliminated as a result of the

current Crew Consist Agreement, however, the work tasks of the Brakemen are being performed by the Conductor (a position I held under the title of Yard Engine Foreman doing identical tasks for the past several years). Now I am essentially doing the same work that I did 34 years ago when I started out with the railroad. The few jobs that my new seniority date allows me to hold are the most undesirable. The general attitude towards me by my current coworkers is that I am no longer wanted around the railroad.

11. The local work agreements were renegotiated this summer to exclude the Brakemen from taking temporary Conductor's positions as had been the past practice. The local work agreements have also been renegotiated recently to allow Conductors to exercise their braking seniority dates, further negating my seniority.

s/ Donald A. Raschke
Donald A. Raschke

Subscribed and sworn to before me this 24 day of October, 1993 by the said Donald A. Rashcke.

s/ Jill M. Langle
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF CLEO D. SCHROEDER DATED OCTOBER 22, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

AFFIDAVIT OF CLEO D. SCHROEDER

Appendix E

I, CLEO D. SCHROEDER, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 9/5/39, I am 54 years of age.

3. I began employment with UPRC on 8/14/61.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work. It was not to may advantage to take promotion at this time.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as Brakemen was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman, I became a Conductor and was forced to give up the corresponding benefits

of my years of service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours: work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages including health problems.

11. My position has been eliminated as a result of the Current Crew Consist Agreement however, the work task of the Brakeman Title continues to be performed by employees who have a different title.

Dated this 22 day of October, 1993.

By: s/ Cleo D. Schroeder
CLEO D. SCHROEDER

Appendix E

STATE OF NEBRASKA)
)
COUNTY OF LINCOLN)

Subscribed and sworn to before me by Cleo D. Schroeder, this 22nd day of October, 1993.

Witness my hand and official seal.

s/ Linda K. Sewald
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF KENNETH W. McINTOSH DATED OCTOBER 22, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

AFFIDAVIT OF KENNETH W. MCINTOSH

Appendix E

I, KENNETH W. McINTOSH, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 6/7/43, I am 50 years of age.

3. I began employment with UPRC on 11/22/68.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as Brakemen was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman, I became a Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by

the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours: work that I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages and marital problems.

11. My position has been eliminated as a result of the Current Crew Consist Agreement however, the work task of the Brakeman Title continues to be performed by employees who have a different title.

Dated this 22 day of October, 1993.

By: s/ Kenneth W. McIntosh
KENNETH W. MCINTOSH

Appendix E

STATE OF NEVADA)
)
COUNTY OF CLARK)

Subscribed and sworn to before me by Kenneth W. McIntosh, this 22 day of October, 1993.

Witness my hand and official seal.

s/ Linda L. Claiborne
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF ROBERT A. PODJENSKI DATED OCTOBER 24, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

AFFIDAVIT OF ROBERT A. PODJENSKI

STATE OF NEBRASKA)
) ss:
COUNTY OF DOUGLAS)

I, ROBERT A. PODJENSKI, being first duly sworn upon oath, do state and depose as follows:

1. I am an employee of the Union Pacific Railroad Company, hereinafter referred to as "UPRC".

2. My date of birth is September 23, 1937, I am 56 years of age.

3. I began employment with Union Pacific Railroad on February 5, 1964.

Appendix E

4. For the last several years of my employment with the UPRC, I was a brakeman. I didn't want to become a Conductor. I was forced to become a Conductor recently, when my position as a Brakeman was eliminated by the Crew Consist Agreement.

5. I relied upon the prior promises in the Crew Consist Agreements, promising me that any crew reductions would be based solely on attrition, so I felt that my position as a Brakeman would be secure until my retirement or until I otherwise left the railroad.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. Due to the manner in which hire out dates and seniority policies of the UPRC are implemented in job bidding, both the railroad and the UTU knew that without some further provision in the agreement, it would have a disparate impact on the Brakemen over 40 years of age, who were obviously those with the earlier seniority dates that were now being negated.

7. When the implementation of the Current Crew Consist Agreement eliminated my position as a Brakeman, I was forced to give up many advantages of my 30 years of seniority for purposes of job bidding. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the current Crew Consist Agreement was implemented by dovetailing with other employees my years of seniority as had been done when the UPRC brought in displaced switchmen during their merger with the Missouri Pacific Railroad. Those displaced employees were able to retain as their only seniority date their braking dates. Their conductor's dates became their braking dates as well.

Appendix E

8. Younger employees with less years of service than I have, who hired out with the railroad much later than I did, are now able to bid on and hold the jobs that I once worked. Despite the fact that I have served as a yard engine foreman (the same job as the current conductor performs) for a period of 20 years, I now must take a seniority date only two years old to that same job on the road.

9. As a result of the implementation of the current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered a drop in my income and a subsequent drop in my lifestyle. I have suffered psychological and medical damages. I am never home with my family like I was before, working 12 hour days six days a week.

10. While I was off for 13 months on the reserve board, after the Brakeman positions were eliminated by the current Crew Consist Agreements, I continued with my normal activities. When I returned to active work on the board, my new seniority date had significantly reduced the number of jobs that I could now bid or work, and they are all very physically demanding jobs. I began having pain in my right hip from doing the more physically demanding work than I had ever done in the past, and after consulting a physician, found that I will need to have my hip replaced, which will result in pain and suffering, have a very negative economic impact for the six or more weeks that I will be off work, and there is some question in my own mind whether I will be able to perform the physically demanding work that I am now doing again once the surgery is completed. I will also have the possibility of having a very visible limp for the rest of my life if the surgery isn't absolutely perfect.

11. It is my understanding that the local work agreements have been renegotiated recently, which excludes the Brakemen

from working the temporary Conductor's positions, as had always been past practice. The local work agreements have also been changed to allow the Conductors to exercise their braking seniority date, further negating my seniority.

s/ Robert A. Podjenski
Robert A. Podjenski

Subscribed and sworn to before me this 24 day of October, 1993 by the said Robert A. Podjenski.

s/ Jill M. Langle
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF GILBERT R. THROM DATED OCTOBER 22, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

AFFIDAVIT OF GILBERT R. THROM

Appendix E

I, GILBERT R. THROM, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 3/7/44, I am 49 years of age.

3. I began employment with UPRC on 4/28/69.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work. It was not to may advantage to take promotion at this time.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as Brakemen was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman, I became a Conductor and was forced to give up the corresponding benefits

of my years of service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours: work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages including health problems.

11. My position has been eliminated as a result of the Current Crew Consist Agreement however, the work task of the Brakeman Title continues to be performed by employees who have a different title.

Dated this 22 day of October, 1993.

By: s/ Gilbert R. Throm
GILBERT R. THROM

Appendix E

STATE OF Kansas)
)
COUNTY OF Marshall)

Subscribed and sworn to before me by Gilbert R. Throm, this 22 day of October, 1993.

Witness my hand and official seal.

s/ Kristi D. Samuelson
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF DONALD K. PETERS DATED OCTOBER 20, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

AFFIDAVIT OF DONALD K. PETERS

Appendix E

I, DONALD K. PETERS, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is JUNE 1, 1950, I am 43 years of age.

3. I began employment with UPRC on JULY 28, 1968.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as Brakemen was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman, I became a Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by

the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours: work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages.

Dated this 20 day of October, 1993.

by: s/ Donald K. Peters
DONALD K. PETERS

STATE OF NEBRASKA)
)
COUNTY OF LINCOLN)

Subscribed and sworn to before me by Donald K. Peters, this 20th day of October, 1993.

Appendix E

Witness my hand and official seal.

s/ Christine V. Reinert
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF ROBERT G. WENZEL DATED OCTOBER 22, 1993

Richard Rideout, Esq.
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(307) 6343-2240

John W. McKendree, Esq.
LAW OFFICES OF JOHN W. McKENDREE
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(303) 861-8906

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

AFFIDAVIT OF ROBERT G. WENZEL

Appendix E

I, ROBERT G. WENZEL, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 12/27/35, I am 57 years of age.

3. I began employment with UPRC on 7/30/63.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work. It was not to may advantage to take promotion at this time.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as Brakemen was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman. I was forced to give up the corresponding benefits of my years of service as a

Appendix E

Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours: work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages including health problems.

11. My position has been eliminated as a result of the Current Crew Consist Agreement however, the work task of the Brakeman Title continues to be performed by employees who have a different title.

Dated this 22nd day of October, 1993.

By: s/ Robert G. Wenzel
ROBERT G. WENZEL

Appendix E

STATE OF OREGON)
)
COUNTY OF MINATILLA)

Subscribed and sworn to before me by Robert G. Wenzel, this 22 day of October, 1993.

Witness my hand and official seal.

s/ Kathy Lynn Virnig
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF CECIL B. MILLER DATED OCTOBER 22, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

AFFIDAVIT OF CECIL B. MILLER

Appendix E

I, CECIL B. MILLER, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 7/25/47, I am 46 years of age.

3. I began employment with UPRC on 8/25/69.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as Brakemen was secure until my retirement.

6. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman, I became a Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

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7. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours: work that I once did when I initially began work with the railroad however, I am working far more hours and am under a great deal of stress.

Dated this 22nd day of October, 1993.

By: s/ Cecil B. Miller
CECIL B. MILLER

STATE OF KANSAS)
)
COUNTY OF MARSHALL)

Subscribed and sworn to before me by Cecil B. Miller, this 22nd day of October, 1993.

Witness my hand and official seal.

s/ Teresa Eccleston
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF LEROY W. ROTH DATED OCTOBER 21, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

AFFIDAVIT OF LEROY W. ROTH

Appendix E

I, LEROY W. ROTH, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 3/30/42, I am 52 years of age.

3. I began employment with UPRC on 5/28/69.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as Brakemen was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman, I became a Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by

Appendix E

the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours: I can't hold any position at my home base except midnight in the yards. Consequently I have been forced to move 200 miles from my home and work a 131 mile job at yard rate. Work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages, gone through a divorce, and in a nut shell my entire lifestyle has changed and will never be the same.

Dated this 21 day of October, 1993.

By: s/ Leroy W. Roth
LEROY W. ROTH

STATE OF Oregon)
)
COUNTY OF Umatilla)

Appendix E

Subscribed and sworn to before me by Leroy W. Roth, this 21 day of October, 1993.

Witness my hand and official seal.

s/ Merilyn J. Kerebee
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF JAMES L. WELLS DATED OCTOBER 22, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, A Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF JAMES L. WELLS

I, JAMES L. WELLS, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 9/16/43, I am 50 years of age.

3. I began employment with UPRC on 4/8/63.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work. At that time there was no advantage for me to take promotion

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as Brakemen was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

Appendix E

7. The implementation of the Current Crew Consist Agreement eliminated my position as a Brakeman. I became a Conductor and was forced to give up my corresponding benefits of my years of service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physical demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours, and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours: work I did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages.

11. Statements have been made to me by co-workers implying or stating that I am no longer wanted or useful as an employee and that I should retire.

Dated this 22 day of October, 1993.

By: s/ James L. Wells
JAMES L. WELLS

Appendix E

STATE OF Washington)
)
COUNTY OF Clark)

Subscribed and sworn to before me by James L. Wells, this 22 day of October, 1993.

Witness my hand and official seal.

s/ Elizabeth Johnson
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF JAMES W. JENKINS DATED OCTOBER 20, 1993

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, A Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF JAMES W. JENKINS

I, JAMES W. JENKINS, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (thereinafter "UPRC")

2. My date of birth is 12/23/40, I am 52 years of age.

3. I began employment with UPRC on 4/6/60.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work. At that time there was no advantage for me to take promotion.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as a Brakeman was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

Appendix E

7. The implementation of the Current Crew Consist Agreement eliminated my position as a Brakeman, I became a Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours, and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours: work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages.

11. Statements have been made to me by co-workers implying or stating that I am no longer wanted or useful as an employee and that I should retire.

Dated this 20 day of October, 1993.

By: s/ James W. Jenkins
JAMES W. JENKINS

Appendix E

STATE OF Oregon)
)
COUNTY OF Minatilla)

Subscribed and sworn to before me by James W. Jenkins, this 20 day of October, 1993.

Witness my hand and official seal.

s/ C.G. Steltenpohl
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF JOHN J. STAMATE DATED OCTOBER 21, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING'

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, A Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF JOHN J. STAMATE

I, JOHN J. STAMATE, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 5/7/41, I am 52 years of age.

3. I began employment with UPRC on 10/26/1960.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as a Brakeman was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist

Appendix E

Agreement, eliminated my position as a Brakeman, I became a Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs and select better hours and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours: work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages.

Dated this 21 day of October, 1993.

By: s/ John J. Stamate
JOHN J. STAMATE

STATE OF OREGON)
)
COUNTY OF Minatilla)

Appendix E

Subscribed and sworn to before me by JOHN J. STAMATE, this 21 day of October, 1993.

Witness my hand and official seal

s/ C.G. Steltenpoml
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF DENNIS J. SMITH DATED OCTOBER 22, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, A Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF DENNIS J. SMITH

I, DENNIS J. SMITH, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 8-20-46. I am 47 years of age.

3. I began employment with UPRC on 11/11/64.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work. At that time there was no advantage for me to take promotion.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as a Brakeman was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

Appendix E

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman. I became a Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physical demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours, and do not have to work the more undesirable, less paying jobs.

9. I am now required to perform less desirable work which I performed when I initially began employment with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages.

11. My position has been eliminated as a result of the Current Crew Consist Agreement however, the work task of the Brakeman Title continues to be performed by employees who have a different title.

Dated this 22 day of October, 1993.

By: s/ Dennis J. Smith
DENNIS J. SMITH

Appendix E

STATE OF Washington)
)
COUNTY OF Clark)

Subscribed and sworn to before me by Dennis J. Smith, this 22 day of October, 1993.

Witness my hand and official seal.

s/ Monna L. Skinner
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF B.L. COVINGTON DATED OCTOBER 20, 1993

Richard Rideout, Esq.
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SALZBURG, BONDS & RIDEOUT, P.C.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING'

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, A Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF B.L. COVINGTON

I, B.L. COVINGTON, having first been duly sworn, states on oath as follows:

1. I am a employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 8/29/49. I am 44 years of age.

3. I began employment with UPRC on 9/23/68.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as Brakemen was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist,

eliminated my position as a Brakeman, I became a Conductor and was forced to give up my corresponding benefits of my years of service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physical demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs and select better hours and do not have to work the more physical demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours: work that I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages.

Dated this 20 day of October, 1993.

By: s/ B.L. Covington
B.L. COVINGTON

STATE OF NEBRASKA)
)
COUNTY OF LINEOLA)

Subscribed and sworn to before me by B.L. Covington, this 20 day of October, 1993.

Appendix E

Witness my hand and official seal.

s/ Betty L. Mitchell
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF ROBERT EDWARD WEDGWOOD DATED OCTOBER 25, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF ROBERT EDWARD WEDGWOOD

I, ROBERT E. WEDGWOOD, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 5/22/39, I am 54 years of age.

3. I began employment with UPRC on 12/4/63

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work. It was not to my advantage to take promotion at this time.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as a Brakeman was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman, I became a

Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs and select better hours and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours; work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages.

Dated this 25th day of October, 1993.

By: s/ Robert Edward Wedgwood
ROBERT EDWARD WEDGWOOD

STATE OF Oregon)
)
COUNTY OF Wasco)

Appendix E

Subscribed and sworn to before me by Robert Edward Wedgwood, this 25th day of October, 1993.

Witness my hand and official seal.

s/ Elizabeth Hombs
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF NORMAN R. THOMAS DATED OCTOBER 23, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, A Utah Corporation and UNITED TRANSPORTATION UNION,

Defendants.

AFFIDAVIT OF NORMAN R. THOMAS

STATE OF NEBRASKA)
) ss:
COUNTY OF DOUGLAS)

I, NORMAN R. THOMAS, being first duly sworn upon oath, do state and depose as follows:

1. I am an employe of the Union Pacific Railroad Company, hereinafter referred to as "UPRC".

2. My date of birth is May 23, 1934, and I am 59 years of age.

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3. I began my employment with the Union Pacific Railroad on May 23, 1952 and subsequently became a Brakeman in 1962.

4. For the last several years of my employment with the UPRC, I was a Brakeman. Prior to the current Crew Consist Agreement, I chose not to become a Conductor, because it was my understanding that I would not need to take the conductor's exam, and could serve as a Brakeman until retirement. I felt that it would not be to my advantage to take a promotion to Conductor, giving up all the seniority related advantages that I enjoyed as a Brakeman.

5. I relied upon the prior promises in the Crew Consist Agreements, promising me that any crew reductions would be based solely on attrition, so I felt that my position as a Brakeman would be secure until my retirement.

6. The current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. Due to the manner in which hire cut dates and seniority policies of the UPRC are implemented in job bidding, both the railroad and the UTU knew that without some further provision in the agreement, it would have a disparate impact on the Brakemen over 40 years of age, who were obviously those with the earlier seniority dates that were now being negated.

7. When the implementation of the current Crew Consist Agreement eliminated my position as a Brakeman, I was forced to give up many advantages of my 31 years of seniority for purposes of job bidding. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the current Crew Consist Agreement was implemented by

dovetailing with other employees my years of seniority as had been done when the UPRC brought in 12 displaced switchmen when the UPRC merged with the Missouri Pacific Railroad. These 12 displaced employees were able to retain as their only seniority date their braking dates. Their conductor's dates became their braking dates as well.

8. Younger employees with less years of service than I have, who hired out with the railroad much later than I did, are now able to bid on and hold the jobs that I once worked. Despite the fact that I have served as a yard engine foreman (the same job as the current conductor performs) for a period of 20 years, I now must take a seniority date only two years old to do that same job on the road.

9. As a result of the implementation of the current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered psychological, economical and personal damages. My wife is constantly complaining after this many years with the UPRC that I am never home anymore.

10. My position has been eliminated as a result of the current Crew Consist Agreement, however, the work tasks of the Brakeman, are performed by the Conductor (a position I held under the title of Yard Engine Foreman doing the same tasks for the past 20 years). Now I am essentially doing the same work that I did 30 years ago when I started out with the railroad. The few jobs that my new seniority date allows me to hold are the most undesirable.

11. The local work agreements were renegotiated this summer to exclude the Brakemen from taking temporary Conductor's positions as had been the practice in the past. The

local work agreements have also been renegotiated recently to allow Conductors to exercise their braking seniority date, further negating my seniority.

s/ Norman R. Thomas
Norman R. Thomas

Subscribed and sworn to before me this 23 day of October, 1993 by the said Norman R. Thomas.

s/ Carol Anderson
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF JON L. STONE DATED OCTOBER 23, 1993

Richard Rideout, Esq.
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SALZBURG, BONDS & RIDEOUT, P.C.
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John W. McKendree, Esq.
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1244 Grant Street
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(303) 861-8906

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF JON L. STONE

I, JON L. STONE, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 12/12/39. I am 53 years of age.

3. I began employment with UPRC on 7/9/58.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work. It was not to may advantage to take promotion at this time.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as Brakemen was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman, I became a

Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours: work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages including health problems.

11. My position has been eliminated as a result of the Current Crew Consist Agreement however, the work task of the brakeman Title continues to be performed by employees who have a different title.

Dated this 23rd day of October, 1993.

By: s/ Jon L. Stone
JON L. STONE

Appendix E

STATE OF Kansas)
)
COUNTY OF (illegible))

Subscribed and sworn to before me by Jon L. Stone, this 23rd day of October, 1993.

Witness my hand and official seal.

s/ Kristen G. Smith
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF STEVEN L. BROWN DATED OCTOBER 23, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF STEVEN L. BROWN

I, STEVEN L. BROWN, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 6/25/45, I am 48 years of age.

3. I began employment with UPRC on 11/28/61.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work. It was not to may advantage to take promotion at this time.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as Brakemen was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman. I became a

Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours an do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours: work I once did when I initially began work with the railroad.

10. As a result of the implementation of the current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages.

11. My position has been eliminated as a result of the current Crew Consist Agreement however, the work task of the Brakeman Title continues to be performed by employes who have a different title.

12. Statements have been made to me by co-workers implying that I am no longer a useful employee and I should retire.

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Dated this 23 day of October, 1993.

By: s/ Steven L. Brown
STEVEN L. BROWN

STATE OF Idaho)
)
COUNTY OF Canyon)

Subscribed and sworn to before me by Steven Brown, this 23 day of October, 1993.

Witness my hand and official seal.

s/ Barbara T. Wade
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF WARREN H. BUSH DATED OCTOBER 29, 1993

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF WARREN H. BUSH

I, WARREN H. BUSH, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad company (hereinafter ("UPRC")

2. My date of birth is 11/22/43, I am 49 years of age.

3. I began employment with UPRC on 1/1/67.

4. For the vast majority of my employment with UPRC I worked as a brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work. It was not to my advantage to take promotion at that time.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as a Brakeman was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

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7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman. I became a Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs and select better hours and do not have to work the more physical demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours: work I once did when I initially began work with the railroad.

10. As a result of the implementation of the current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages.

Dated this 20 day of October, 1993.

By: s/ Warren H. Bush
WARREN H. BUSH

STATE OF Nebraska)
)
COUNTY OF Lincoln)

Appendix E

Subscribed and sworn to before me by Warren H. Bush, this 20 day of October, 1993.

Witness my hand and official seal.

s/ Brenda Luebbe
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF MELVIN E. SAYRE DATED OCTOBER 22, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

AFFIDAVIT OF MELVIN E. SAYRE

I, MELVIN E. SAYRE, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

Appendix E

2. My date of birth is 1/18/44, I am 49 years of age.

3. I began employment with UPRC on 3/15/65.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work. It was not to my advantage to take promotion at that time.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as a Brakeman was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman. I became a Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

Appendix E

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs and select better hours and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours: work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages.

11. Statements have been made to me by co-workers that "I was to old, to stupid, and don't count anymore". Statement was also made to me by General Chairman, Mr. L. L. Nelson "the brakemen no longer count as there are to few of them left".

Dated this 22 day of October, 1993.

By s/ Melvin E.Sayre
MELVIN E. SAYRE

STATE OF Oregon)
)
COUNTY OF (illegible))

Subscribed and sworn to before me by Melvin E. Sayre, this 22 day of October, 1993.

Witness my hand and official seal.

s/ Kathy Lynn Kirnig
Notary Public
[SEAL}

Appendix E

EXHIBIT — AFFIDAVIT OF ROBERT E. LANNON DATED OCTOBER 20, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF ROBERT E. LANNON

I, ROBERT E. LANNON, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 10/17/48, I am 45 years of age.

3. I began employment with UPRC on 4/2/68.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result was able to hold better runs as a Brakeman and able to select better hours for the performance of my work. It was not to may advantage to take promotion at this time.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as Brakemen was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

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7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman, I became a Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours; work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected, I have suffered economic and personal damages including health problems.

11. My position has been eliminated as a result of the Current Crew Consist Agreement however, the work task of the Brakeman Title continues to be performed by employees who have a different title.

Dated this 20 day of October, 1993.

By: s/ Robert E. Lannon
ROBERT E. LANNON

Appendix E

STATE OF Nebraska)
)
COUNTY OF Lincoln)

Subscribed and sworn to before me by Robert E. Lannon, this 20 day of October, 1993.

Witness my hand and official seal.

s/ Brenda J. Luebbe
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF GERALD T. DUELING

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

vs.

UNION PACIFIC RAILROAD COMPANY, A Utah Corporation and UNITED TRANSPORTATION UNION,

Defendants.

AFFIDAVIT OF GERALD T. DUELING

STATE OF NEBRASKA)
) ss:
COUNTY OF DOUGLAS)

I, GERALD T. DUELING, being first duly sworn upon oath, do state and depose:

1. I am an employee of the Union Pacific Railroad Company, hereinafter referred to as "UPRC".

2. My date of birth is September 20, 1941, and I am 52 years of age.

Appendix E

3. I began my employment with the Union Pacific Railroad on November 19, 1969.

4. For the last several years of my employment with the UPRC, I was a Brakeman. I was never offered the change to be promoted to Conductor until the latest Crew Consist Agreement eliminated the Brakeman positions and the railroad informed me that the Conductor's exam was mandatory.

5. I relied upon the prior promises in the Crew Consist Agreements, promising me that any crew reductions would be based solely on attrition, so I felt my position as a Brakeman would be secure until my retirement or until I otherwise left the railroad.

6. The current Crew Consist Agreement between the UPRC and the United Transportation Union, effective February 1, 1992 eliminated my position as a Brakeman. Due to the manner in which hire out dates and seniority policies of the UPRC are implemented in job bidding, both the railroad and the UTU knew that without some further provision in the agreement, it would have a disparate impact on the Brakemen over 40 years of age, who were obviously those with the earlier seniority dates that were now being negated. In fact, the buyout agreements offered to us by the railroad were based on seniority, to make it a much more attractive enticement for older employees to leave.

7. When the implementation of the current Crew Consist Agreement eliminated my position as a Brakeman, I was forced to give up many advantages of my several years of seniority. There was no attempt by the UPRC or the UTU to preserve my years of seniority, as had been done when the Union Pacific Railroad and the Missouri Pacific Railroad merged and employees were displaced.

Appendix E

8. Younger employees with less years of service than I now have, who hired out with the railroad much later than I did, are now able to bid on and hold the jobs that I once worked. Despite the fact that I have served as a yard engine foreman (the same job tasks and rules as the current Conductor) for several yaers, I now must take a seniority date only two years old to do that same job on the road.

9. As a result of the implementation of the current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered psychological, personal and economic damages. In fact, the loss of my job caused such severe stress for me that I worried constantly, was unable to sleep at night (as I had in the past), I began having chest pain and shortness of breath, and on October 6, 1993, my doctor diagnosed me as having a heart attack. My new position has exacerbated my stress symptoms, because I know my supervisors watched me more than ever before, looking for any error I make for which they might terminate me. I am currently off work on medical leave, and my doctor says that I cannot even look at returning to work until at least 12/01/93, and perhaps not even then. My prospects do not look good, which creates even more stress. I have lost 18 pounds of weight since October 6. The physical demands of my most recent job were very depressing. My body is not in the physical condition of the younger workers who worked it prior to me being forced to take that job, and because I am not in the same physical condition as 20 years ago and can't run as fast nor am I willing to break operating rules and take chances with my safety to get the work done more quickly, I feel the railroad and my former coworkers and supervisors were trying to force me to quit.

10. My position was eliminated as a result of the current Crew Consist Agreement, however, the work tasks of the

Appendix E

Brakeman are being performed by the Conductor now (a position I held under the title of Yard Engine Foreman doing identical tasks for the past several years). Now when I work I am doing the same work that I did 24 years ago when I started out with the railroad. The few jobs that my new seniority date allows me to hold are the most undesirable. The general attitude towards me by my current coworkers is that I am no longer wanted around the railroad.

11. The local work agreements were renegotiated this summer to exclude the Brakemen from taking temporary Conductor's positions as had been the past practice. The local work agreements have also been renegotiated recently to allow Conductors to exercise their braking seniority dates, further negating my seniority.

s/ Gerald T. Dueling
Gerald T. Dueling

Subscribed and sworn to before me this 24 day of October, 1993 by the said Gerald T. Dueling.

s/ Jill M. Langle
Notary Public

[SEAL]

Appendix F

EXHIBIT — AFFIDAVIT OF RUSSELL P. EGGERS DATED OCTOBER 22, 1993

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF RUSSELL P. EGGERS

I, RUSSELL P. EGGERS, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 2/02/35, I am 58 years of age.

3. I began employment with UPRC on 7/18/53.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work. It was not to may advantage to take promotion at this time.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as Brakemen was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman. I became a

Appendix E

Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours: work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages including health problems.

11. My position has been eliminated as a result of the Current Crew Consist Agreement however, the work task of the Brakeman Title continues to be performed by employees who have a different title.

12. After being forced back to the position of a switchman I found out they were training younger employees for select yard foreman jobs. I asked Bob Coleman (Manager Yard Operations) to be trained for these positions also and was told: "I would not be around long enough to be trained".

Appendix E

Dated this 22 day of October, 1993.

By: s/ Russell P. Eggers
RUSSELL P. EGGERS

STATE OF Nebraska)
)
COUNTY OF Lincoln)

Subscribed and sworn to before me by Russell P. Eggers, this 22 day of October, 1993.

Witness my hand and official seal.

s/ Brenda J. Luebbe
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF RONALD G. VAN NORTWICK DATED OCTOBER 22, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF RONALD G. VAN NORTWICK

I, RONALD G. VAN NORTWICK, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 6/14/37, I am 56 years of age.

3. I began employment with UPRC on 7/29/67.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as Brakemen was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist, eliminated my position as a Brakeman, I became a Conductor and was forced to give up my corresponding benefits of my years of

service as Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours, and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours; work that I once did when I initially began work with the railroad. I'm suffering with a back injury that was caused by my years of service with the railroad and having to do the more strenuous work I have constant back pain of which, because of our type of work and railroad policy I am not allowed to take any pain medication for relief.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages.

11. Co-workers have suggested to me that I should take the buy-out.

Dated this 22 day of October, 1993

By: s/ Ronald Van Nortwick
RONALD VAN NORTWICK

Appendix E

STATE OF NEBRASKA)
)
COUNTY OF LINCOLN)

Subscribed and sworn to before me by Ronald Van Nortwick, this 22 day of October, 1993.

Witness my hand and official seal.

s/ Barbara E. Dawson
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF TOM M. MCMURTRY DATED OCTOBER 22, 1993

Richard Rideout, Esq.
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SALZBURG, BONDS & RIDEOUT, P.C.
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John W. McKendree, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF TOM M. MCMURTRY

I, TOM M. MCMURTRY, having been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 7/5/48, I am 45 years of age.

3. I began employment with UPRC on 4/13/73.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work. It was not to may advantage to take promotion at this time.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as Brakemen was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman. I became a

Appendix E

Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours; work I once did when I initially began work with the railroad.

10. As a result of the implementation of the current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages including health problems.

11. My position has been eliminated as a result of the Current Crew Consist Agreement however, the work task of the Brakeman Title continues to be performed by employees who have a different title.

Dated this 22 day of October, 1993.

By s/ Tom M. McMurtry
TOM M. MCMURTRY

Appendix E

STATE OF Nebraska)
)
COUNTY OF Lincoln)

Subscribed and sworn to before me by Tom M. McMurtry, this 22 day of October, 1993.

Witness my hand and official seal.

s/ Betty L. Mitchell
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF MICHAEL E. VALENTINE DATED OCTOBER 22, 1993

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF MICHAEL E. VALENTINE

I, MICHAEL E. VALENTINE, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 12/13/42. I am 50 years of age.

3. I began employment with UPRC on 10/14/66.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work. It was not to may advantage to take promotion at this time.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as Brakemen was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist

Appendix E

Agreement, eliminated my position as a Brakeman, I became a Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours; work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected, I have suffered economic and personal damages including health problems.

11. My position has been eliminated as a result of the Current Crew Consist Agreement however, the work task of the Brakeman Title continues to be performed by employees who have a different title.

Dated this 22nd day of October, 1993.

By: s/ Michael E. Valentine
MICHAEL E. VALENTINE

Appendix E

STATE OF Kansas)
)
COUNTY OF Marshall)

Subscribed and sworn to before me by Michael E. Valentine, this 22nd day of October, 1993.

Witness my hand and official seal.

s/ Teresa Eggleston
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF GARY L. YANKEN DATED OCTOBER 20, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF GARY L. YANKEN

I, GARY L. YANKEN, having first been duly sworn, states on oath as follows:

1. I am a employe of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 4/11/47, I am 46 years of age.

3. I began employment with UPRC on 9/18/68.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as Brakemen was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist, eliminated my position as a Brakeman. I became a Conductor and was forced to give up my corresponding benefits of my years of

service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physical demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs and select better hours and do not have to work the more physical demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours; work that I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages.

Dated this 20 day of October, 1993.

By: s/ Gary L. Yanken
GARY L. YANKEN

STATE OF Nebraska)
)
COUNTY OF Lincoln)

Appendix E

Subscribed and sworn to before me by Gary L. Yanken, this 20 day of October, 1993.

Witness my hand and official seal.

s/ Betty L. Mitchell
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF MICHAEL I. CARLSON DATED OCTOBER 23, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, A Utah Corporation and UNITED TRANSPORTATION UNION,

Defendants.

AFFIDAVIT OF MICHAEL I. CARLSON

STATE OF NEBRASKA)
) ss:
COUNTY OF DOUGLAS)

I, Michael I. Carlson, being first duly sworn upon oath, do state:

1. I am an employee of the Union Pacific Railroad Company, hereinafter referred to as "UPRC".

2. My date of birth is 5/6/50, and I am 43 years of age.

3. I began employment with the Union Pacific Railroad on June 20, 1972.

Appendix E

4. For the last several years of my employment with the UPRC, I worked as a Brakeman. Prior to the current Crew Consist Agreement, I chose not to become a Conductor. My decision was based upon the promise of prior Crew Consist Agreements that I would never need to take the Conductor's exam and because my Brakeman's seniority date allowed me to have more choice of regular jobs I could hold as a Brakeman than I would have as a Conductor.

5. I also relied upon the prior promises in the Crew Consist Agreements that promised that any crew reductions would be based solely on attrition, and I felt that my position as a Brakeman would be secure until my retirement or until I chose to leave my job or was terminated.

6. The current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. Due to the manner in which hire out dates and seniority policies of the UPRC are implemented in job bidding, both the railroad and the UTU knew that without some further provision in the agreement, it would have a disparate impact on Brakemen over 40 years of age, who were obviously those with the earlier seniority dates that were now being negated.

7. When the implementation of the current Crew Consist Agreement eliminated my position as a Brakeman, I could hold no regular jobs as a Brakeman, and I was forced onto an extra board, which requires more hours at the railroad away from my family, and I will make less money this year for all my additional effort and hardship.

8. Younger employees with less years of service than I have,

who hired out with the railroad much later than I did, are now able to bid on and hold the jobs that I once worked.

9. As a result of the implementation of the current Crew Consist Agreement, I have been required to suffer severe lifestyle changes, spending little time with my family, and I have had to give up most of the competitive recreational pursuits I once enjoyed because of my sporadic work schedules. I have likewise had to cease contact with most of my former friends. I have consulted my personal physician, Dr. Romano, because I was feeling depressed. He advised me to stop working so many hours and enjoy more recreation. I am unable to plan any recreation around my work schedule, and when I am able to have any recreation time, I cannot relax and enjoy myself as I have been able to do in the past.

10. My position has been eliminated as a result of the current Crew Consist Agreement, however, the work tasks of the Brakeman, which previously performed continues to be performed by employees with a different title.

11. Whenever there is a physically demanding or degrading task to do, such as going out into the rain or having to walk in the mud, or walking through rotten smelly grain areas, if conductors are conversing about the undesirable aspects of a job that I have worked, one conductor will say to the other, "Oh, I've got a Brakeman to do that". I feel comments such as those and being forced to work under such conditions because I have been stripped of my seniority demeans me as a person.

12. I feel that I must be extremely cautious in performing my tasks, because I am afraid one of my coworkers might initiate disciplinary proceedings to have me investigated and terminated

if I break even the simplest of rules because of my grievance and this lawsuit, or simply to improve their own position.

s/ Michael I. Carlson
Michael I. Carlson

Subscribed and sworn to before me this 23 day of October, 1993 by the said Michael I. Carlson.

s/ Jill M. Langle
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF SAMMY L. CROSS DATED OCTOBER 22, 1993

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF SAMMY L. CROSS

I, SAMMY L. CROSS, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 5/4/38, I am 55 years of age.

3. I began employment with UPRC on 8/5/58.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work. It was not to may advantage to take promotion at this time.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as Brakemen was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman, I became a

Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours: work I once did when I initially began work with the railroad.

10. As a result of the implementation of the current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages including health problems.

11. My position has been eliminated as a result of the Current Crew Consist Agreement however, the work task of the Brakeman Title continues to be performed by employees who have a different title.

Appendix E

Dated this 22 day of October, 1993.

By: s/ Sammy L. Cross
SAMMY L. CROSS

STATE OF Kansas)
)
COUNTY OF (illegible))

Subscribed and sworn to before me by Sammy L. Cross, this 22 day of October, 1993.

Witness my hand and official seal.

s/ Kristen G. Smith
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF DARRELL D. MILLER DATED OCTOBER 20, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF DARRELL D. MILLER

I, DARRELL D. MILLER, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 7/24/42, I am 51 years of age.

3. I began employment with UPRC on 10/5/64.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as a Brakeman was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman, I became a Conductor and was forced to give up the corresponding benefits

of my years of service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs and select better hours and do not have to work the more physical demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours: work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected, I have suffered economic and personal damages.

11. Statements have been made to me, "why don't you old men just go ahead and retire you don't need the money anyway."

Dated this 20 day of October, 1993.

By: s/ Darrell D. Miller
DARRELL D. MILLER

STATE OF Nebraska)
)
COUNTY OF Lincoln)

Appendix E

Subscribed and sworn to before me by Darrell D. Miller, this 20 day of October, 1993.

Witness my hand and official seal.

s/ Brenda J. Luebbe
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF LARRY S. CLARK DATED OCTOBER 20, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF LARRY S. CLARK

I, LARRY S. CLARK, having first been duly sworn, states on oath as follows:

1. I am a employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 12/18/38, I am 54 years of age.

3. I began employment with UPRC on 8/14/61.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as Brakemen was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist, eliminated my position as a Brakeman. I became a Conductor and was forced to give up my corresponding benefits of my years of

service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physical demanding work and causing me to suffer consequent damages.

8. Younger employers with less years of service with the railroad than myself are now able to hold the better runs and select better hours and do not have to work the more physical demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours; work that I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages.

Dated this 20 day of October, 1993.

By: s/ Larry S. Clark
LARRY S. CLARK

STATE OF Nebraska)
)
COUNTY OF Lincoln)

Appendix E

Subscribed and sworn to before me by Larry S. Clark, this 20 day of October, 1993.

Witness my hand and official seal.

s/ Anita J. Wills
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF ROBERT T. EPLER DATED OCTOBER 21, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF ROBERT T. EPLER

I, ROBERT T. EPLER, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 3/26/51, I am 42 years of age.

3. I began employment with UPRC on 8/12/73.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to old better runs as a Brakeman and able to select better hours for the performance of my work. It was not to my advantage to take promotionn at this time.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as a Brakeman was secure until my retirement.

6. My position has been eliminated as a result of the Current Crew Consist Agreement however, the work task of the Brakeman Title continues to be performed by employees who have a different title.

7. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as Brakeman. The railroad and the UTU

knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

8. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman, I became a Conductor and was forced to give up my corresponding benefits of my years of service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physical demanding work and causing me to suffer consequent damages.

9. Younger employees with less years of service with the railroad than myself are now able to hold the better runs and select better hours and do not have to work the more physical demanding jobs.

10. I am now required to perform physically demanding work during undesirable hours: work that I once did when I initially began work with the railroad.

11. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages.

Dated this 21 day of October, 1993.

By: s/ Robert T. Epler
ROBERT T. EPLER

Appendix E

STATE OF Nebraska)
)
COUNTY OF Lincoln)

Subscribed and sworn to before me by Robert T. Epler, this 21 day of October, 1993.

Witness my hand and official seal.

s/ Betty L. Mitchell
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF RICHARD W. CAVENDER DATED OCTOBER 20, 1993

Richard Rideout, Esq.
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John W. McKendree, Esq.
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Denver, Colorado 80203
(303) 861-8906

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF RICHARD W. CAVENDER

I, RICHARD W. CAVENDAR, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 3-7-42, I am 51 years of age.

3. I began employment with UPRC on 6-4-62.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as a Brakeman was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement eliminated my position as a Brakeman. I became a Conductor and was forced to give up the corresponding benefits

of my years of service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs and select better hours and do not have to work the more physical demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours; work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected, I have suffered economic and personal damages.

Dated this 20th day of October, 1993.

By: s/ Richard W. Cavender
RICHARD W. CAVENDER

STATE OF Oregon)
)
COUNTY OF Washington)

Appendix E

Subscribed and sworn to before me by Richard W. Cavender, this 20th day of October, 1993.

Witness my name and official seal.

s/ Grace N. Krueger
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF DALE YOUNG DATED OCTOBER 22, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF DALE YOUNG

I, DALE YOUNG, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 9/21/45, I am 48 years of age.

3. I began employment with UPRC on 4/8/68.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work. It was not to my advantage to take promotion at that time.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as a Brakeman was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The UPRC and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman, I became a

Appendix E

Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours, performing more physically demanding work, and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours, makes better money, and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours: work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages.

11. My position has been eliminated as a result of the current Crew Consist Agreement however, the work task of the Brakeman Title continues to be performed by employees who have a different title.

Dated this 22 day October, 1993.

By: s/ Dale Young
DALE YOUNG

Appendix E

STATE OF Kansas)
)
COUNTY OF (illegible))

Subscribed and sworn to before me by Dale Young, this 22 day of October, 1993.

Witness my hand and official seal.

s/ Kristen G. Smith
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF ROBERT F. MCINTOSH DATED OCTOBER 22, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF ROBERT F. MCINTOSH

I, ROBERT F. MCINTOSH, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad company (hereinafter "UPRC)"

2. My date of birth is 12/7/41, I am 51 years of age.

3. I began employment with UPRC on 8/30/73.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work. It was not to may advantage to take promotion at this time.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as Brakemen was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist

Appendix E

Agreement, eliminated my position as a Brakeman, I became a Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours; work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages.

11. My position has been eliminated as a result of the Current Crew Consist Agreement however, the work task of the Brakeman Title continues to be performed by employees who have a different title.

Dated this 22nd day of October, 1993.

By s/ Robert F. McIntosh
ROBERT F. MCINTOSH

Appendix E

STATE OF NEVADA)
)
COUNTY OF CLARK)

Subscribed and sworn to before me by ROBERT F. MCINTOSH, this 22 day of October, 1993.

Witness my hand and official seal.

s/ Linda L. Claiborne
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF JULIAN R. NELSON DATED OCTOBER 21, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF JULIAN R. NELSON

I, JULIAN R. NELSON, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date or birth is 2/19/44, I am 49 years of age.

3. I began employment with UPRC on 7/4/67.

4. For the vast majority of my employment with UPRC I worked as Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work. It was not to may advantage to take promotion at this time.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as Brakemen was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman, I became a

Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours; work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages including health problems.

11. My position has been eliminated as a result of the Current Crew Consist Agreement however, the work task of the Brakeman Title continues to be performed by employees who have a different title.

12. Remarks have been made to me by a conductor to the effect you have no say in what it is done you should have taken promotion when it was offered.

Appendix E

Dated this 21 day of October, 1993.

By: s/ Julian R. Nelson
JULIAN R. NELSON

STATE OF Nebraska)
)
COUNTY OF Lincoln)

Subscribed and sworn to before me by Rena R. Hansen, this 21 day of October, 1993.

Witness my hand and official seal.

s/ Rena R. Hansen
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF WALTER T. GRONEK JR. DATED OCTOBER 22, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF WALTER T. GRONEK JR.

I, WALTER T. GRONEK JR., having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 7/5/42, I am 51 years of age.

3. I began employment with UPRC on 2/8/73.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work. It was not to my advantage to take promotion at this time.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon these agreements and felt that my position as a Brakeman was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

Appendix E

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman. I became a Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs and select better hours and do not have to work the more physically demanding jobs.

9. I was injured while performing work that I once had to do when I initially went to work for the railroad but was not now in physical shape to do the same work. Due to the injury I was off work for five and a half months upon my return I discovered that I had been demoted to yard work because without the benefits of my years of service as a Brakeman I could no longer hold a road job I am now required to perform physically demanding work during undesirable hours: work I once did when I initially began working with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages.

11. I am now required to fill the position of conductor to preform the same tasks I was performing as a Brakeman without my years of service to aid my job selection & working conditions.

Appendix E

Dated this 22 day of October, 1993.

By: s/ Walter T. Gronek
WALTER T. GRONEK

STATE OF Kansas)
)
COUNTY OF (illegible))

Subscribed and sworn to before me by Walter T. Gronek, this 22 day of October, 1993.

Witness my hand and official seal.

s/ Kristen G. Smith
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF PHILIP J. EBERHARDT DATED OCTOBER 22, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF PHILIP J. EBERHARDT

I, PHILIP J. EBERHARDT, having first been duly sworn, states on oath as follows:

1. I am an employee of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 1/27/41, I am 52 years of age.

3. I began employment with UPRC on 5/2/69.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work. It was not to my advantage to take promotion at this time.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as a Brakemen was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

Appendix E

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman. I became a Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours, and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undersirable hours; work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages including health problems.

11. My position has been eliminated as a result of the Current Crew Consist Agreement however, the work task of the Brakeman Title continues to be performed by employees who have a different title.

11. Remarks have been made to me that "we older guys should just take the buy-out and quit."

Appendix E

Dated this 22 day of October, 1993.

By: s/ Philip J. Eberhardt
PHILIP J. EBERHARDT

STATE OF Oregon)
)
COUNTY OF illegible)

Subscribed and sworn to before me by P.J. Eberhardt, this 22 day of October, 1993.

Witness my hand and official seal.

s/ Kathy Lynn King
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF ROXIE L. JACKSON DATED OCTOBER 23, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, A Utah Corporation and UNITED TRANSPORTATION UNION,

Appendix E

Defendants.

AFFIDAVIT OF ROXIE L. JACKSON

STATE OF NEBRASKA)
) ss:
COUNTY OF DOUGLAS)
)

I, ROXIE LEE JACKSON, having first been duly sworn upon oath, do state and depose as follows:

1. I am an employee of the Union Pacific Railroad Company, hereinafter referred to as "UPRC".

2. My date of birth is January 16, 1948 and I am 45 years of age.

3. I began my employment with the Union Pacific Railroad on June 1, 1966.

4. For the last several years of my employment with the UPRC, I worked as a Brakeman. Prior to the Current Crew Consist Agreement, I chose not to become a Conductor. My decision was based upon the fact that I had established a number of years of service as a Brakeman and as a result, I was able to hold more desirables jobs as a Brakeman (shifts and locations) to perform my job. I felt that because I would have less favorable hours and locations, it would not be to my advantage to take a promotion to Conductor, giving up all the seniority related advantages that I enjoyed as a Brakeman.

5. I also relied upon the prior promises in the Crew Consist Agreements that promised that any crew reductions would be

based solely on attrition, and I felt that my position as a Brakeman would be secure until my retirement, or until I chose of my own volition to leave my job or was terminated by the company.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as a Brakeman. Due to the manner in which hire out dates and seniority policies of the UPRC are implemented in job bidding, both the railroad and the UTU knew that without some further provision in the agreement, it would have a disparate impact on Brakemen over 40 years of age, who were obviously those with the earlier seniority dates that were now being negated.

7. When the implementation of the Current Crew Consist Agreement eliminated my position as a Brakeman, I was forced to give up many advantages of my 27 years of seniority for purposes of job bidding. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the current Crew Consist Agreement was implemented by dovetailing with other employees my years of seniority as has been done in the past by the UPRC and the UTU when merger or sales agreements were made between the railroads. Due to the fact that I have been stripped of my seniority date, I can only bid and hold one job, which requires me to work in a more undesirable location for longer hours. This is the last zone local job that I can now hold, requiring me to spend significant amounts of time living away from my family and I am working six days a week, twelve hours a day.

8. Younger employees with less years of service than I have, who hired out with the railroad much later than I did, are now able to bid on and hold the jobs that I once worked.

Appendix E

9. As a result of the implementation of the current Crew Consist Agreement, my lifestyle has been dramatically affected, I have suffered psychological, economical and personal damages, including my current need to take 600 mg. to 800 mg. of IBUPROFEN daily just to deal with the physical aches and pains that I have. In addition, I have had to secure living arrangements in Columbus to enable me to be at work each morning at 6:00 a.m. This has decreased my net disposable earnings. In addition, I am able to spend only Saturday night and Sunday with my family each week, and I believe my six year old son, with whom I preciously had a very close relationship suffers as a result of this.

10. My position has been eliminated as a result of the current Crew Consist Agreement, however, the work tasks of the Brakeman, which I previously performed continues to be performed by employees with a different title.

11. Statements have been made to me by my co-workers implying that I am not longer wanted, and I should just take the buyoff. When I began my current assignment in Columbus, Nebraska, UPRC clients I began serving told me that they had been told by other UPRC employees that a "fat old man" would be servicing them from now on.

12. I have also experienced what I believe to be some tampering with railroad switches on my shift, which I believe to be sabotage, designed to get me fired for rules violations.

Further affiant saith not.

s/ Roxie L. Jackson
Roxie L. Jackson

Appendix E

Subscribed and sworn to before me this 23 day of October, 1993, by the said Roxie Lee Jackson.

s/ Jill M. Langle
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF RONALD R. JOHNSON DATED OCTOBER 20, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF RONALD R. JOHNSON

I, RONALD R. JOHNSON, having first been duly sworn, states on oath as follows:

1. I am a employe of the Union Pacific Railroad Company (hereinafter "UPRC")

2. My date of birth is 1/1/47, I am 46 years of age.

3. I began employment with UPRC on 9/15/68.

4. For the vast majority of my employment with UPRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had a established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work.

5. Additionally prior Crew Consist Agreements stated that Crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as Brakemen was secure until my retirement.

6. The Current Crew Consist Agreement between the UPRC and United Transportation Union effective February 1, 1992 eliminated my position as Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist, eliminated my position as a Brakeman, I became a Conductor and was forced to give up my corresponding benefits of my years of

service as a Brakeman. There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physical demanding work and causing me to suffer consequent damages.

8. Younger employers with less years of service with the railroad than myself are now able to hold the better runs and select better hours and do not have to work the more physical demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours; work that I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages.

Dated this 20 day of October, 1993.

By: s/ Ronald R. Johnson
RONALD R. JOHNSON

STATE OF Nebraska)
)
COUNTY OF Lincoln)

Appendix E

Subscribed and sworn to before me by Ronald R. Johnson, this 20 day of October, 1993.

Witness my hand and official seal.

s/ Connie J. Cook
Notary Public

[SEAL]

Appendix E

AFFIDAVITS FOR BURLINGTON PLAINTIFFS

Appendix E

EXHIBIT — AFFIDAVIT OF JEROME J. SMITH LEAD PLAINTIFF, DATED OCTOBER 23, 1993

Richard Rideout, Esq.
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SALZBURG, BONDS & RIDEOUT, P.C.
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(303) 861-8906

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0210-B

JEROME J. SMITH, et al.,

Plaintiffs,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, A Delaware corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF JEROME J. SMITH

I, JEROME J. SMITH, having first been duly sworn, states on oath as follows:

1. I am an employee of the Burlington Northern Railroad Company (hereinafter "BNRC")

2. My date of birth is 5/18/51, I am 42 years of age.

3. I began employment with BNRC on 5/31/69.

4. To understand my claim of age discrimination it is important to note my history of employment. For the majority of my employment with the BNRC, I have worked in the Brakeman craft. I took Conductor promotion in 1972 and worked in that capacity on the BNRC until 1974, when I voluntarily relinquished my Conductor's rights. That decision was based on the facts that I had married, we were expecting our first child, had bought a home, had auto loans to pay, and I could not make enough money working as a Conductor to support my family. In order to make enough money, my only alternative was to work a higher paying job, which only my Brakeman's seniority would allow me to hold. Because of my low standing at that time on the conductor's seniority roster, I was continually being forced to work lower paying jobs. Therefore, I relinquished my Conductor rights, as did many employees at Alliance, older and younger in seniority than myself. This decision also allowed me to work on the highest monetary rated runs on my seniority district, which was a condition of the merger protection guarantee which I have possessed since 1970.

5. I believe my ADEA rights were violated by results of the

Appendix E

Crew Consist negotiations between BNRC & UTU but not by the action of PEB 219, the congress, the president of the United States, by the special board (102-29) or any other agency of the Railway Labor Act. The Current Crew Consist Agreement between the BNRC and UTU effective October 31, 1991 affected the discrimination I described in the affidavit because my age. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

6. The estimate made by the Texas Equal Employment Opportunity Commission in Dallas, that 58.25% (see attached determination letter) at a minimum, of employed Brakemen on the BNRC are in the protected age group, is low. When previously promoted Conductors, junior in seniority to myself are removed from the data used to arrive at the 58.25% figure, a more accurate picture of the disparate impact upon non-promoted Brakemen is seen. This will result in a much higher percentage of effected employees than the 58.25% figure offered by the Texas EEOC in Dallas for the protected age group.

7. As a result of the new Crew Consist Agreement, the job title and position of Brakemen on all through freight trains has been eliminated. However, the work which Brakemen formerly performed is still performed on a daily basis solely by Conductors. This work includes, but is not limited to: picking up and setting out of cars, inspecting trains and enroute throwing switches, cleaning snow out of switches, and taking power to and from trains to fueling stations of diesel facilities. Many of the aforementioned Conductors at my location are younger than I am age wise and are much younger than I in overall seniority as is evidenced by observing a Wyoming District Brakeman's Seniority roster. Prior to the implementation of the 1991 Crew

Consist, I was able to work on any run I desired using my Brakeman's seniority date. After implementation of the Crew Consist in 1991, I am able to work 1 (one) road Brakeman position at my home terminal and the yard position at Alliance, NE. the road position prior to 1991 Crew Consist have been taken by younger employees. Therefore, the claims of non-discrimination by BNRC and UTU, because of Brakeman position elimination, are not supported because of facts shown by work task performance evidence, which will support my claim.

8. The UTU and BNRC has knowledge of my age and years of service with BNRC. The BRNC produces, and UTU verifies for accuracy on a yearly basis, a Wyoming District Seniority roster on which I appear. The existence of the seniority roster proves BNRC's and UTU's knowledge of my standing beyond doubt. From the outset of Crew Consist negotiations, it was the intent of the BNRC and UTU, to force discrimination on age protected employees. The EEOC and Nebraska EXEO found that there was a prima facie case discrimination in my actions before them.

9. Evidence presently available, and my affidavit, demonstrates age bias against me by BNRC and UTU. I am reduced to working a job I never considered working, while younger employees are allowed to work more desirable, and less strenuous positions which I formerly held. I signed papers stating I could never retake Conductor's promotion after I relinquished my Conductor's rights in 1974. Since 1974, I have been denied by officers of BNRC and UTU, the right to take my Conductor's promotion prior to the 1991 Crew Consist agreement. This, I attempted three times in the period from 1975 to 1981, and each time I was told I could never become a Conductor because I had forfeited my Conductor's rights in 1974. During this period of

time many of the other plaintiffs in this case were denied promotion to Conductor for the same reason; (they passed up promotion). After the 1981 Crew Consist came in effect, I did not make another attempt to take Conductor's promotion because that agreement established that I could not be adversely effected because I was not a promoted Conductor. That agreement was interpreted by both BNRC and UTU officials to non-promoted Brakeman, that our positions were to be phased out by the process of attrition.

10. I am now required to perform physically demanding work during undesirable hours; work I once did when I initially began work with the railroad.

11. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected, I have suffered economic problems and personal damages (my daughter was unable to attend the college of her choice, my wife and I are continually arguing over financial matters that we never had to argue about before, and my savings accounts are being depleted, I was unable to take an annual trip to my father-in-law's which my family has always participated in, the rest of my family attended but I had to stay behind and work, this is the first time in 22 years I have missed this trip)

12. Statements have been made to me by co-workers (I am continually ridiculed and called a "drone" I'm told drone "should be forced to the yard". My name has been written on bathroom walls, My name was given and everything I own was advertised for sale (including my wife) — a card was posted on a bulletin board advertising this — my phone number and place of residence was included on the card. Union officials referred to myself and other Brakeman at a local union meeting as drones. I

protested these remarks and Gary Daniels (local chairman) laughed and said he didn't know what else to call us.

Dated this 23rd day of October, 1993.

By: s/ Jerome J. Smith
JEROME J. SMITH

STATE OF NEBRASKA)
)
COUNTY OF BOX BUTTE)

Subscribed and sworn to before me by Jerome J. Smith, this 23 day of October 1993.

s/ Patsy E. Rohrbouck
Notary Public

[SEAL]

Appendix E

EXHIBIT — SENIORITY ROSTERS ANNEXED TO FOREGOING AFFIDAVIT OF JEROME J. SMITH

[Omitted here but printed separately as Lodging Appendix.]

Appendix E

EXHIBIT — AFFIDAVIT OF MICHAEL X. KOSMICKI DATED OCTOBER 21, 1993

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0120-B

JEROME J. SMITH, et al.,

Plaintiffs,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, A Delaware Corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF MICHAEL X. KOSMICKI

I, MICHAEL X. KOSMICKI, having first been duly sworn, states on oath as follows:

1. I am an employee of the Burlington Northern Railroad company (hereinafter "BNRC")

2. My date of birth is 11/22/40, I am 53 years of age.

3. I began employment with BNRC on 10/26/63.

4. For the vast majority of my employment with the BNRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition, I relied upon this agreement and felt that my position as a Brakeman was secure until my retirement.

6. The Current Crew Consist Agreement between the BNRC and United Transportation Union effective October 25, 1991 eliminated my position as a Brakeman. The railroad and the union knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

Appendix E

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman, I became a Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the BNRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours, working away from home, and performing more physically demanding work causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, do not have to work away from home, select better hours, and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours: work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages.

11. My position has been eliminated as a result of the current Crew Consist Agreement however, the work task of the Brakeman Title continues to be performed by employees who have a different title.

Appendix E

Dated this *21* day of October, 1993.

By: s/ Michael X. Kosmicki
MICHAEL X. KOSMICKI

STATE OF Nebraska
COUNTY OF Box Butte

Subscribed and sworn to before me by Michael X. Kosmicki, this 21 day of October, 1993.

Witness my hand and official seal.

s/ Patsy E. Rohrbouck
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF RICHARD J. MCCUNE DATED OCTOBER 22, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0210-B

JEROME J. SMITH, et al.,

Plaintiffs,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, A Delaware corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF RICHARD J. McCUNE

I, RICHARD J. McCUNE, having first been duly sworn, states on oath as follows:

1. I am an employee of the Burlington Northern Railroad Company (hereinafter "BNRC")

2. My date of birth is 2/28/48 and I am 45 years of age.

3. I began employment with BNRC on 8/28/70.

4. For the vast majority of my employment with the BNRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition, I relied upon this agreement and felt that my position as a Brakeman was secure until my retirement.

6. The Current Crew Consist Agreement between the BNRC and United Transportation Union effective October 25, 1991 eliminated my position as a Brakeman. The railroad and the union knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman, I became a

Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the BNRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours and performing more physically demanding work causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours, and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours; work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected, I have suffered economic and personal damages.

11. My position has been eliminated as a result of the current Crew Consist Agreement however, the work task of the Brakeman Title continue to be performed by employees who have a different title.

12. Statements have been made to me by co-workers and supervisors implying or stating that I am no longer wanted or useful as an employee.

Appendix E

Dated this 22 day of October, 1993.

By: s/ Richard J. McCune
RICHARD J. McCUNE

STATE OF Nebraska)
)
COUNTY OF Box Butte)

Subscribed and sworn to before me by Richard J. McCune, this 22nd day of October, 1993.

Witness my hand and official seal.

s/ Betty A. Bush
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF STEVEN L. BURBACH DATED OCTOBER 22, 1993

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0210-B

JEROME J. SMITH, et al.,

Plaintiffs,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, A Delaware corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF STEVEN L. BURBACH

I, STEVEN L. BURBACH, having first been duly sworn, states on oath as follows:

1. I am an employee of the Burlington Northern Railroad Company (hereinafter "BNRC")

2. My date of birth is 7/12/52, I am 41 years of age.

3. I began employment with BNRC on 6/8/73.

4. For the vast majority of my employment with the BNRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work. It was not to my advantage to take promotion at this time.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition, I relied upon this agreement and felt that my position as a Brakeman was secure until my retirement.

6. The Current Crew Consist Agreement between the BNRC and United Transportation Union effective October 25, 1991 eliminated my position as a Brakeman. The railroad and the union knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

Appendix E

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman, I became a Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the BNRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours and performing more physically demanding work causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours, and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours; work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected, I have suffered economic and personal damages. I feel totally insucure with my future with the railroad, my lifestyle of my family life has been detrimentally effected.

11. My position has been eliminated as a result of the current Crew Consist Agreement however, the work task of the Brakeman Title continues to be performed by employees who have a different title.

12. Statements have been made to me; "you had your chance you should have taken the promotion before".

Appendix E

Dated this 22 day of October, 1993.

By: s/ Steven L. Burbach
STEVEN L. BURBACH

STATE OF Nebraska)
)
COUNTY OF Lancaster)

Subscribed and sworn to before me by Steven L. Burbach, this 22 day of October, 1993.

Witness my hand and official seal.

s/ Kimberly Bryant
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF EARL J. VANCE DATED OCTOBER 22, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0210-B

JEROME J. SMITH, et al.,

Plaintiffs,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, A Delaware corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF EARL J. VANCE

I, EARL J. VANCE, having first been duly sworn, states on oath as follows:

1. I am an employee of the Burlington Northern Railroad Company (hereinafter "BNRC")

2. My date of birth is 2/7/41, I am 52 years of age.

3. I began employment with BNRC on 6/15/70.

4. For the vast majority of my employment with the BNRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition, I relied upon this agreement and felt that my position as a Brakeman was secure until my retirement.

6. The Current Crew Consist Agreement between the BNRC and United Transportation Union effective October 25, 1991 eliminated my position as a Brakeman. The railroad and the union knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman, I became a

Appendix E

Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the BNRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours and performing more physically demanding work causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours, and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours; work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered personal damages.

Dated this 22 day of October, 1993.

By: s/ Earl J. Vance
EARL J. VANCE

STATE OF Nebraska)
)
COUNTY OF Lancaster)

Appendix E

Subscribed and sworn to before me by Earl J. Vance, this 22 day of October, 1993.

Witness my hand and official seal.

s/ Kathryn L. Gould
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF BRUCE O. STAFFORD DATED OCTOBER 23, 1993

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0210-B

JEROME J. SMITH, et al.,

Plaintiffs,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, A Delaware corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF BRUCE O. STAFFORD

I, BRUCE O. STAFFORD, having first been duly sworn, states on oath as follows:

1. I am an employee of the Burlington Northern Railroad Company (hereinafter "BNRC")

2. My date of birth is 7/31/47 I am 46 years of age.

3. I began employment with BNRC on 6/8/66.

4. For the vast majority of my employment with the BNRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition, I relied upon this agreement and felt that my position as a Brakeman was secure until my retirement.

6. The Current Crew Consist Agreement between the BNRC and United Transportation Union effective October 25, 1991 eliminated my position as a Brakeman. The railroad and the union knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman, I became a

Appendix E

Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the BNRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours and performing more physically demanding work causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours, and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours; work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected, I have suffered economic and personal damages.

11. My position has been eliminated as a result of the current Crew Consist Agreement however, the work task of the Brakeman Title continues to be performed by employees who have a different title.

Dated this 23rd day of October, 1993.

By: s/ Bruce O. Stafford
BRUCE O. STAFFORD

Appendix E

STATE OF MISSOURI)
)
COUNTY OF CLAY)

Subscribed and sworn to before me by BRUCE O. STAFFORD, this 23rd day of October, 1993.

Witness my hand and official seal.

s/ Dickie L. Connors
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF TRACY B. MILLER DATED OCTOBER 23, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0210-B

JEROME J. SMITH, et al.,

Plaintiffs,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, A Delaware corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF TRACY B. MILLER

I, TRACY B. MILLER having first been duly sworn, states on oath as follows:

1. I am an employee of the Burlington Northern Railroad Company (hereinafter "BNRC")

2. My date of birth is 11/23/47, I am 45 years of age.

3. I began employment with BNRC on 7/20/66.

4. For the vast majority of my employment with the BNRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition, I relied upon this agreement and felt that my position as a Brakeman was secure until my retirement.

6. The Current Crew Consist Agreement between the BNRC and United Transportation Union effective October 25, 1991 eliminated my position as a Brakeman. The railroad and the union knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman, I became a

Appendix E

Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the BNRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours and performing more physically demanding work causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours, and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours; work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected, I have suffered economic and personal damages.

11. My position has been eliminated as a result of the current Crew Consist Agreement however, the work task of the Brakeman Title continues to be performed by employees who have a different title.

Dated this 23rd day of October, 1993.

By: s/ Tracy B. Miller
TRACY B. MILLER

Appendix E

STATE OF Missouri)
)
COUNTY OF Buchanan)

Subscribed and sworn to before me by Tracy B. Miller, this 23rd day of October, 1993.

Witness my hand and official seal.

s/ Janet C. Lucas
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF WILLIAM A. MYERS DATED OCTOBER 21, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0210-B

JEROME J. SMITH, et al.,

Plaintiffs,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, A Delaware corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF WILLIAM A. MYERS

I, WILLIAM A. MYERS, having first been duly sworn, states on oath as follows:

1. I am an employee of the Burlington Northern Railroad Company (hereinafter "BNRC")

2. My date of birth is 10/25/41, I am 52 years of age.

3. I began employment with BNRC on 9/29/77.

4. For the vast majority of my employment with the BNRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition, I relied upon this agreement and felt that my position as a Brakeman was secure until my retirement.

6. The Current Crew Consist Agreement between the BNRC and United Transportation Union effective October 25, 1991 eliminated my position as a Brakeman. The railroad and the union knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman. I became a

Appendix E

Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the BNRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours and performing more physically demanding work causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours, and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours; work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected, I have suffered economic and personal damages.

11. My position has been eliminated as a result of the current Crew Consist Agreement however, the work task of the Brakeman Title continues to be performed by employees who have a different title.

Dated this 21 day of October, 1993.

By: s/ William A. Myers
WILLIAM A. MYERS

Appendix E

STATE OF Nebraska)
)
COUNTY OF Box Butte)

Subscribed and sworn to before me by William A. Myers, this 21st day of October, 1993.

Witness my hand and official seal.

s/ Patsy E. Rohrbouck
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF GENE P. NOONAN DATED OCTOBER 22, 1993

Richard Rideout, Esq.
HERSCHLER, FREUDENTHAL,
SALZBURG, BONDS & RIDEOUT, P.C.
314 East 21st St.
P.O. Box 387
Cheyenne, Wyoming 82001
(307) 6343-2240

John W. McKendree, Esq.
LAW OFFICES OF JOHN W. McKENDREE
1244 Grant Street
Denver, Colorado 80203
(303) 861-8906

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0210-B

JEROME J. SMITH, et al.,

Plaintiffs,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, A Delaware corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF GENE P. NOONAN

I, GENE P. NOONAN, having first been duly sworn, states on oath as follows:

1. I am an employe of the Burlington Northern Railroad Company (hereinafter "BNRC")

2. My date of birth is 10/16/36, I am 57 years of age.

3. I began employment with BNRC on 10/1/66.

4. For the vast majority of my employment with the BNRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition, I relied upon this agreement and felt that my position as a Brakeman was secure until my retirement.

6. The Current Crew Consist Agreement between the BNRC and United Transportation Union effective October 25, 1991 eliminated my position as a Brakeman. The railroad and the union knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman, I became a

Appendix E

Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the BNRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours and performing more physically demanding work causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, do not have to work jobs away from home, select better hours, and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours; work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages.

11. My position has been eliminated as a result of the current Crew Consist Agreement however, the work task of the Brakeman Title continues to be performed by employees who have a different title.

Dated this 22 day of October, 1993.

By: s/ Gene P. Noonan
GENE P. NOONAN

Appendix E

STATE OF Nebraska)
)
COUNTY OF Lancaster)

Subscribed and sworn to before me by Gene P. Noonan, this 22 day of October, 1993.

Witness my hand and official seal.

s/ Kathryn L. Gould
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF KENNETH J. PUCHALSKI, DATED OCTOBER 21, 1993

Richard Rideout, Esq.
HERSCHLER, FREUDENTHAL,
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0210-B

JEROME J. SMITH, et al.,

Plaintiffs,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, A Delaware corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF KENNETH J. PUCHALSKI

I, KENNETH J. PUCHALSKI, having first been duly sworn, states on oath as follows:

1. I am a employe of the Burlington Northern Railroad Company (hereinafter "BNRC")

2. My date of birth is 6/11/43, I am 49 years of age.

3. I began employment with BNRC on 7/21/70.

4. For the vast majority of my employment with the BNRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had established a number of years of service as a Brakeman and as a result, I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition. I relied upon this agreement and felt that my position as a Brakeman was secure until my retirement.

6. The Current Crew Consist Agreement between the BNRC and United Transportation Union effective October 25, 1991 eliminated my position as a Brakeman. The railroad and the union knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman, I became a

Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the BNRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours and performing more physically demanding work causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours, and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours; work I once did when I initially began work with he railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected, I have suffered economic and personal damages.

Dated this 21 day of October, 1993.

By: s/ Kenneth J. Puchalski
KENNETH J. PUCHALSKI

STATE OF WISCONSIN)
)
COUNTY OF LA CROSSE)

Appendix E

Subscribed and sworn to before me by Kenneth J. Puchalski, this 21 day of October, 1993.

Witness my hand and official seal.

s/ Deanna L. Wolf
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF ROBERT L. KEENAN, DATED OCTOBER 21, 1993

Richard Rideout, Esq.
HERSCHLER, FREUDENTHAL,
SALZBURG, BONDS & RIDEOUT, P.C.
314 East 21st St.
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John W. McKendree, Esq.
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(303) 861-8906

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0210-B

JEROME J. SMITH, et al.,

Plaintiffs,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, A Delaware corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF ROBERT L. KENNAN

I, ROBERT L. KEENAN, having first been duly sworn, states on oath as follows:

1. I am a employe of the Burlington Northern Railroad Company (hereinafter "BNRC)

2. My date of birth is 3/20/50. I am 43 years of age.

3. I began employment with BNRC on 3/1/72.

4. For the vast majority of my employment with the BNRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition, I relied upon this agreement and felt that my position as a Brakeman was secure until my retirement.

6. The Current Crew Consist Agreement between the BNRC and United Transportation Union effective October 25, 1991 eliminated my position as a Brakeman. The railroad and the union knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman, I became a

Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the BNRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours and performing more physically demanding work causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours, and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours; work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages.

Dated this 21 day of October, 1993.

By: s/ Robert L. Keenan
ROBERT L. KEENAN

STATE OF Illinois)
)
COUNTY OF Kane)

Appendix E

Subscribed and sworn to before me by _____, this 21 day of October, 1993.

Witness my hand and official seal.

s/ Shannon Norman
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF CHARLES W. ROHE DATED OCTOBER 22, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0210-B

JEROME J. SMITH, et al.,

Plaintiffs,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, A Delaware corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF CHARLES W. ROHE

I, CHARLES W. ROHE, having first been duly sworn, states on oath as follows:

1. I am an employee of the Burlington Northern Railroad Company (hereinafter "UPRC")

2. My date of birth is 11/9/40. I am 52 years of age.

3. I began employment with UPRC on 8/12/62.

4. For the vast majority of my employment with BNRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as a Brakeman was secure until my retirement.

6. The Current Crew Consist Agreement between the BNRC and United Transportation Union effective October 25, 1991 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman, I became a

Appendix E

Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the BNRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours, performing more physically demanding work, and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours, and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours; work that I once did when I initially began work with the railroad.

10. My position has been eliminated as a result of the current Crew Consist Agreement however, the work task of the Brakeman Title continues to be performed by employees who have a different title.

11. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages.

Dated this 22nd day of October, 1993.

By: s/ Charles W. Rohe
CHARLES W. ROHE

Appendix E

STATE OF Nebraska)
)
COUNTY OF Lancaster)

Subscribed and sworn to before me by Charles W. Rohe, this 22 day of October, 1993.

Witness my hand and official seal.

s/ Kathryn L. Gould
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF STEVEN E. BISHOP DATED OCTOBER 23, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0210-B

JEROME J. SMITH, et al.,

Plaintiffs,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, A Delaware corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF STEVEN E. BISHOP

I, STEVEN E. BISHOP, having first been duly sworn, states on oath as follows:

1. I am an employee of the Burlington Northern Railroad Company (hereinafter "BNRC")

2. My date of birth is 10/21/50, I am 42 years of age.

3. I began employment with BNRC on 12/16/75.

4. For the vast majority of my employment with the BNRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose to remain a brakeman. My decision was based upon the fact that I had established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman an able to select better hours for the performance of my work. It was not to my advantage to take promotion at this time.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition. I relied upon this agreement and felt that my position as a Brakeman was secure until my retirement.

6. The current Crew Consist Agreement between the BNRC and United Transportation Union effective October 25, 1991 eliminated my position as a Brakeman. The railroad and the union knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman, I became a Conductor and was forced to give up the corresponding benefits

of my years of service as a Brakeman. There was no attempt by the BNRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours and performing more physically demanding work causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours, and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours; work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages. I am insecure in my future with the railroad and under stress because of such.

11. My position has been eliminated as a result of the current Crew Consist Agreement however, the work task of the Brakeman title continues to be performed by employees who have a different title.

12. Statements have been made to me by co-workers "we are just drones and as such we should be forced to stay in the yards".

Appendix E

Dated this 23 day of October, 1993.

By: s/ Steven E. Bishop
STEVEN E. BISHOP

STATE OF Nebraska)
)
COUNTY OF Box Butte)

Subscribed and sworn to before me by Steven E. Bishop, this 23 day of October, 1993.

Witness my hand and official seal.

s/ Patsy E. Rohrbouck
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF ROGER G. MAZANEC DATED OCTOBER 21, 1993

Richard Rideout, Esq.
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SALZBURG, BONDS & RIDEOUT, P.C.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0210-B

JEROME J. SMITH, et al.,

Plaintiffs,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, A Delaware corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF ROGER G. MAZANEC

I, ROGER G. MAZANEC, having first been duly sworn, states on oath as follows:

1. I am an employee of the Burlington Northern Railroad Company (hereinafter "BNRC")

2. My date of birth is 1/4/52. I am 41 years of age.

3. I began employment with BNRC on 8/14/70.

4. For the vast majority of my employment with the BNRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition, I relied upon this agreement and felt that my position as a Brakeman was secure until my retirement.

6. The Current Crew Consist Agreement between the BNRC and United Transportation Union effective October 25, 1991 eliminated my position as a Brakeman. The railroad and the union knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman, I became a

Appendix E

Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the BNRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours and performing more physically demanding work causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours, and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours; work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages.

11. My position has been eliminated as a result of the current Crew Consist Agreement however, the work task of the Brakeman Title continues to be performed by employees who have a different title.

Dated this 21 day of October, 1993.

By: s/ Roger G. Mazanec
ROGER G. MAZANEC

Appendix E

STATE OF Nebraska)
)
COUNTY OF Box Butte)

Subscribed and sworn to before me by Roger G. Mazanec, this 21st day of October, 1993.

Witness my hand and official seal.

s/ Betty A. Bush
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF STEVEN V. BREW DATED OCTOBER 21, 1993

Richard Rideout, Esq.
HERSCHLER, FREUDENTHAL,
SALZBURG, BONDS & RIDEOUT, P.C.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0210-B

JEROME J. SMITH, et al.,

Plaintiffs,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, A Delaware corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF STEVEN V. BREW

I, STEVEN V. BREW, having first been duly sworn, states on oath as follows:

1. I am a employe of the Burlington Northern Railroad Company (hereinafter "BNRC")

2. My date of birth is 8/19/52, I am 41 years of age.

3. I began employment with BNRC on 11/15/72.

4. For the vast majority of my employment with BNRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work. It was not to my advantage to take promotion at this time.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition and I relied upon this agreement and felt that my position as a Brakemen was secure until my retirement.

6. The Current Crew Consist Agreement between the BNRC and United Transportation Union effective October 25, 1991 eliminated my position as a Brakeman. The railroad and the UTU knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist, Agreement eliminated my position as a Brakeman, I became a

Appendix E

Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the BNRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours performing more physically demanding work and causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours, and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours; work I once did when I initially began work with the railroad.

10. As a result of the implemetation of the of the Current Crew Consist Agreement my lifestyle has been dramatically affected. I have suffered economic and personal damages. I have lost my house almost lost my marriage, and have been under an incredible amount of stress.

11. My position has been eliminated as a result of the current Crew Consist Agreement however, the work task of the Brakeman title continue to be performed by employees who have a different title.

11. Statements have been made to me by co-workers "all drones are going to be put back in the yards where they belong".

Appendix E

Dated this 21st day of October, 1993.

By: s/ Steven V. Brew
STEVEN V. BREW

STATE OF Nebraska)
)
COUNTY OF Box Butte)

Subscribed and sworn to before me by Steven V. Brew, this 21st day of October, 1993.

Witness my hand and official seal.

s/ Patsy E. Rohrbouck
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF ROGER E. ROHRBOUCK DATED OCTOBER 21, 1993

Richard Rideout, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0210-B

JEROME J. SMITH, et al.,

Plaintiffs,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, A Delaware corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF ROGER E. ROHRBOUCK

I, ROGER E. ROHRBOUCK, having first been duly sworn, states on oath as follows:

1. I am an employee of the Burlington Northern Railroad Company (hereinafter "BNRC")

2. My date of birth is 1/23/44, I am 49 years of age.

3. I began employment with BNRC on 3/24/74.

4. For the vast majority of my employment with the BNRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition. I relied upon this agreement and felt that my position as a Brakeman was secure until my retirement.

6. The Current Crew Consist Agreement between the BNRC and United Transportation Union effective October 25, 1991 eliminated my position as a Brakeman. The railroad and the union knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman, I became a

Appendix E

Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the BNRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours and performing more physically demanding work causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours, and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours; work I once did when initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages.

11. My position has been eliminated as a result of the current Crew Consist Agreement however, the work task of the Brakeman Title continues to be performed by employees who have a different title.

Dated this 21 day of October, 1993.

By: s/ Roger E. Rohrbouck
ROGER E. ROHRBOUCK

Appendix E

STATE OF Nebraska)
)
COUNTY OF Box Butte)

Subscribed and sworn to before me by Roger E. Rohrbouck, this 21 day of October 1993.

Witness my hand and official seal.

s/ Patsy E. Rohrbouck
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF JAMES C. MORITZ DATED OCTOBER 22, 1993

Richard Rideout, Esq.
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John W. McKendree, Esq.
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(303) 861-8906

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0210-B

JEROME J. SMITH, et al.,

Plaintiffs,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, A Delaware corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF JAMES C. MORITZ

I, JAMES C. MORITZ, having first been duly sworn, states on oath as follows:

1. I am an employee of the Burlington Northern Railroad Company (hereinafter "BNRC")

2. My date of birth is 6/19/49, I am 44 years of age.

3. I began employment with BNRC on 6/6/73.

4. For the vast majority of my employment with the BNRC I worked as a Brakeman. Prior to the Current Crew Consist Agreement I chose not to become a Conductor. My decision was based upon the fact that I had established a number of years of service as a Brakeman and as a result I was able to hold better runs as a Brakeman and able to select better hours for the performance of my work.

5. Additionally prior Crew Consist Agreements stated that crew reduction was based solely on attrition. I relied upon this agreement and felt that my position as a Brakeman was secure until my retirement.

6. The Current Crew Consist Agreement between the BNRC and United Transportation Union effective October 25, 1991 eliminated my position as a Brakeman. The railroad and the union knew that without some further provision in the agreement it would have a disparate impact on Brakemen over 40 years of age.

7. The implementation of the Current Crew Consist Agreement, eliminated my position as a Brakeman. I became a

Conductor and was forced to give up the corresponding benefits of my years of service as a Brakeman. There was no attempt by the BNRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented, by dove tailing with other employees my years of service or otherwise distributing the burden of having to work the longer hours and performing more physically demanding work causing me to suffer consequent damages.

8. Younger employees with less years of service with the railroad than myself are now able to hold the better runs, select better hours, and do not have to work the more physically demanding jobs.

9. I am now required to perform physically demanding work during undesirable hours; work I once did when I initially began work with the railroad.

10. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected. I have suffered economic and personal damages.

11. My position has been eliminated as a result of the current Crew Consist Agreement however, the work task of the Brakeman title continues to be performed by employees who have a different title.

12. The article in the Omaha World Herald concerning this lawsuit was posted on our local bulletin board and the word SCABS was written on it.

Appendix E

Dated this 22 day of October, 1993.

By: s/ James C. Moritz
JAMES C. MORITZ

STATE OF Nebraska)
)
COUNTY OF Box Butte)

Subscribed and sworn to before me by James C. Moritz, this 22 day of October 1993.

Witness my hand and official seal.

s/ Patsy E. Rohrbouck
Notary Public

[SEAL]

Appendix E

EXHIBIT — AFFIDAVIT OF JEROME J. SMITH DATED OCTOBER 23, 1993

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 93-CV-0210-B

JEROME J. SMITH, et al.,

Plaintiffs,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, A Delaware corporation and UNITED TRANSPORTATION UNION,

Defendants.

Appendix E

AFFIDAVIT OF JEROME J. SMITH

I, JEROME J. SMITH, having first been duly sworn on oath as follows:

1. I am an employee of the Burlington Northern Railroad Company (hereinafter "BNRC")

2. My date of birth is 5/18/51. I am 42 years of age.

3. I began employment with BNRC on 5/31/69.

4. To understand my claim of age discrimination it is important to note my history of employment. For the majority of my employment with the BNRC, I have worked in the Brakeman craft. I took Conductor promotion in 1972 and worked in that capacity on the BNRC until 1974, when I voluntarily relinquished my Conductor's rights. That decision was based on the facts that I had married, we were expecting our first child, had bought a home, had auto loans to pay, and I could not make enough money working as a Conductor to support my family. In order to make enough money, my only alternative was to work a higher paying job, which only my Brakeman's seniority would allow me to hold. Because of my low standing at that time on the Conductor's seniority roster, I was continually being forced to work lower paying jobs. Therefore, I relinquished my Conductor right, as did many employees at Alliance, older and younger in seniority than myself. This decision also allowed me to work on the highest monetary rated runs on my seniority district, which was a condition of the merger protection guarantee which I have possessed since 1970.

5. I believe my ADEA rights were violated by results of the Crew Consist Negotiations between BNRC & UTU but not by the

action of PEB 219, the congress, the president of the United States, by the special board (102-29) or any other agency of the Railway Labor Act. The Current Crew Consist Agreement between the (illegible, crossed out) BNRC and UTU effective (illegible, crossed out) October 31,[J.J.S.] 1992 affected the discrimination I described in the affidavit because my age. The railroad and the UTU knew that without some further provision the agreement it would have a disparate impact on Brakemen over 40 years of age.

6. The estimate made by the Texas Equal Employment Opportunity Commission in Dallas, that 58.25%, (see attached determination letter) at a minimum, of employed Brakemen on the BNRC are in the protected age group, is low. When previously promoted Conductors, junior in seniority to myself are removed from the data used to arrive at the 58.25% figure, a more accurate picture of the disparate impact upon non-promoted Brakemen is seen. This will result in a much higher percentage of effected employees than the 58.25% figure offered by the Texas EEOC in Dallas for the protected age group.

7. As a result of the new Crew Consist Agreement, the job title and position of Brakemen on all through freight trains has been eliminated. However, the work which Brakemen formerly performed is still performed on a daily basis solely by Conductors. This work includes, but is not limited to: picking up and setting out of cars, inspecting trains and enroute throwing switches, cleaning snow out of switches, and taking power to and from trains to fueling stations of diesel facilities. Many of the aforementioned Conductors at my location are younger than I am age wise and are much younger than I in overall seniority as is evidenced by observing a Wyoming District Brakeman's Seniority roster. Prior to the implementation of the 1991 Crew Consist I was able to work on any run I desired using my

Brakeman's seniority date. After implementation of the Crew Consist in 1991, I am able to work 1 (one) road Brakeman position at my home terminal and the yard position at Alliance, NE. The road position prior to 1991 Crew Consist have been taken by younger employees. Therefore, the claims of non-discrimination by BNRC and UTU, because of Brakeman position elimination, are not supported because of facts shown by work task performance evidence, which will support my claim.

8. The UTU and BNRC has knowledge of my age and years of service with BNRC. The BRNC produces, and UTU verifies for accuracy on a yearly basis, a Wyoming District Seniority roster on which I appear. The existence of the seniority roster proves BNRC's and UTU's knowledge of my standing beyond doubt. From the outset of Crew Consist negotiations, it was the intent of the BNRC and UTU, to force discrimination on age protected employees. The EEOC and Nebraska EXEO found that there was a prima facie case of discrimination in my actions before them.

9. Evidence presently available, and my affidavit, demonstrates age bias against me by BNRC and UTU. I am reduced to working a job I never considered working, while younger employees are allowed to work more desirable, and less strenuous positions which I formerly held. I signed papers stating I could never retake Conductor's promotion after I relinquished my Conductor's rights in 1974. Since 1974, I have been denied by officers of BNRC and UTU, the right to take my Conductor's promotion prior to the 1991 Crew Consist agreement. This, I attempted three times in the period from 1975 to 1981, and each time I was told I could never become a Conductor because I had forfeited my Conductor's rights in 1974. During this period of time many of the plaintiffs in this case were denied promotion to Conductor for the same reason: (they passed up promotion). After

the 1981 Crew Consist came into effect, I did not make another attempt to take Conductor's promotion because that agreement established that I could not be adversely effected because I was not a promoted Conductor. That agreement was interpreted by both BNRC and UTU officials to non-promoted Brakeman, that our positions were to be phased out by the process of attrition.

10. I am now required to perform physically demanding work during undesirable hours; work I once did when I initially began work with the railroad.

11. As a result of the implementation of the Current Crew Consist Agreement, my lifestyle has been dramatically affected, I have suffered economic problems and personal damages (my daughter was unable to attend the college of her choice, my wife and I are continually arguing over financial matters that we never had to argue about before, and my savings accounts are being depleted. I was unable to take an annual trip to my father-in-law's which my family has always participated in, the rest of my family attended but I had to stay behind and work, this is the first time in 22 years I have missed this trip)

12. Statements have been made to me by co-workers (I am continually ridiculed and called a "drone" I'm told a drone "should be forced to the yard". My name has been written on bathroom walls. My name was given and everything I own was advertised for sale (including my wife) - a card was posted on a bulletin board advertising this - my phone number and place of residence was included on the card. Union officials referred to myself and other Brakeman at a local union meeting as drones. I protested these remarks and Gary Daniels (local chairman) laughed and said he didn't know what else to call us.

Appendix E

Dated this 23rd day of October, 1993.

By: s/ Jerome J. Smith
JEROME J. SMITH

STATE OF Nebraska)
)
COUNTY OF Box Butte)

Subscribed and sworn to before me by Jerome J. Smith, this 23 day of October, 1993.

Witness my hand and official seal.

s/ Patsy E. Rohrbouck
Notary Public

[SEAL]

APPENDIX F — AFFIDAVIT OF RICHARD RIDEOUT DATED OCTOBER 17, 1994

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Civil Action No. 93CV210J

JEROME J. SMITH, MICHAEL R. RAMOLD, MICHAEL X. KOSMICKI, RICHARD J. McCUNE, DANIEL L. EASTMAN, DONALD E. LOOKER, ROBERT A. HARGER, STEVEN L. BURBACH, DONALD S. SEGHI, ROLAND G. BEARD, EARL J. VANCE, BRUCE O. STAFFORD, RICHARD K. LOEHNING, JR., TRACY B. MILLER, GARY L. JONES, ROBERT M. HAGY, WILLIAM A. MYERS, GENE P. NOONAN, KENNETH J. PUCHALSKI, ROBERT L. KEENAN, ROBERT F. GARLAND, DAVID A. GROWE, MICHAEL P. O'NEILL, TIMOTHY J. HOPPE, ALBERT G. KELSCH, STEVEN F. MASSEY, JOHN M. CRAWFORD, TARRELL L. NEWMAN, BILL G. HAMILTON, VERL W. MOORE, CHARLES W. ROHE, ALBERT W. GREENWOOD, GERALD A. GOMPERT, GARY L. KATIEPOLT, DICK JONES, JON LUTZ, CHARLES D. BARNHILL, LARRY G.

Appendix F

WRIGHT, THOMAS W. SCHAEFER, JOHN C. ROSENSTOCK, STEVEN E. BISHOP, ROGER G. MAZANEC, EDWARD JAY DIETZ, STEVE V. BREW, LAVERN L. BROWN, DONALD MASEK, DONALD ROSEKRANS, ROBERT H. HALL, JACK A. REIGHARD, ROGER E. ROHRBOUCK, JAMES MORITZ, HAROLD JONES,

Plaintiffs,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, A Delaware Corporation and UNITED TRANSPORTATION UNION,

Defendants.

STATE OF WYOMING)
) ss.
COUNTY OF LARAMIE)

AFFIDAVIT OF RICHARD RIDEOUT

I, Richard Rideout, being first duly sworn upon my oath, state and depose as follows:

1. I am co-counsel for the Plaintiffs in the above-entitled matter with Mr. John W. McKendree, of Denver, Colorado. The statements that I make in this affidavit are based on my personal knowledge of the facts related to this action.

2. The Initial Pretrial Conference ("the Conference" or "the IPC") in this case and in the companion case of *Hiatt, et al. v.*

Appendix F

Union Pacific Railroad Company and United Transportation Union, No. 93-CV-209-B was noticed on September 9, 1993 and scheduled to be held on September 17, 1993. I participated in the Conference by telephone as I was out of town on that date and Mr. McKendree was out of the country. Local counsel for some of the Defendants attended in person and other counsel participated by telephone. Mr. Broder, who represents the United Transportation Union ("UTU"), also participated by telephone and was connected in a conference call with me to the Magistrate, Hon. William C. Beaman, who conducted the IPC.

3. At the Conference, counsel for the Burlington Northern Railroad Company ("BNRC"), Mr. George E. Powers, Jr., made a request to the Magistrate that any and all discovery be stayed, including the self-executing, routine discovery required by Rule 26 of the Local Rules for the United States District Court, for the District of Wyoming, pending resolution of their Motion to Dismiss as discovery was unnecessary to the resolution of the dispositive motion and would be time consuming and expensive. Mr. Powers had previously advised me by letter dated September 16, 1993, and orally before the hearing, that he would be requesting the stay, as discovery was unnecessary to the resolution of the BNRC's Motion to Dismiss, which was directed only to the legal issue of whether the district court had "subject matter jurisdiction" over the action. Therefore, no discovery was required or necessary.

4. After discussion of miscellaneous scheduling issues of the type and kind normally addressed in an IPC, the Magistrate brought up the subject of the requested stay before Mr. Powers made his oral motion, and after a very brief argument, granted BNRC's oral motion (no formal motion was ever filed) and ordered all discovery, including the self executing, routine discovery, stayed pending resolution of the dispositive motions. I

raised the issue with the Magistrate of whether the Plaintiffs might need some discovery prior to resolution of the pending motions, as both of the parties who had then filed their motions, as both of the parties who had then filed their motions to dismiss (the BNRC and the Union Pacific Railroad Company; the UTU had not, as yet, filed their Motion to Dismiss, but indicated that it would be filed shortly) had appended materials outside of the pleadings to their motions and supported the same by affidavit, and I objected to the stay to the extent that it would deny to the Plaintiffs an opportunity to respond to the appended material. The Magistrate advised me that if, after a review of the pending motions, the Plaintiffs believed that they needed some limited, directed discovery that would relate to the issue of the subject matter jurisdiction of the court (i.e., the issues raised in the pending motions to dismiss), that the Plaintiffs should raise the issue with him and he would consider it at that time.

The stay order is set forth on page 3 of the court's Order On Initial Pretrial Conference dated and entered on September 20, 1993.

5. As the basis of all of the pending dispositive motions of all of the Defendants was the district court's alleged lack of "subject matter jurisdiction," a review of the Motions and the material attached thereto, did not suggest that the actions would or could be resolved on any other issue, nor did the Motions require any additional discovery to respond to the issues raised therein. Therefore, the plaintiffs did not request that the court allow them to proceed with discovery directed at any other legal or factual issues as none was or is necessary to address the legal issues raised in the Defendants' dispositive motions.

6. The district court subsequently, on it's own motion, without notice, converted the pending motions to summary

judgment motions and ruled on one claim (the "disparate treatment" claim) on the basis that the Plaintiffs had failed to submit sufficient evidence to withstand a grant of the Motion in the Defendants' favor.

Further Affiant Sayeth Naught.

s/ Richard Rideout
Richard Rideout

STATE OF WYOMING)
) ss.
COUNTY OF LARAMIE)

Subscribed and sworn to before me by Richard Rideout this 17th day of October, 1994.

Witness my hand and official seal.

s/ Ruthmary L. Manners
Notary Public

[SEAL]

APPENDIX G — AFFIDAVIT OF RICHARD RIDEOUT DATED OCTOBER 17, 1994

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Civil Action No. 93CV209B

LEONARD K. HIATT, ROBERT A. BAGBY, MARVIN CRABAUGH, GARY W. BOATRIGHT, RONALD L. ROBERSON, CARL D. HOUK, JERROLD B. HUTCHINGS, DUANE K. HINKLE, LARRY L. BURBACK, STEPHEN J. MILLER, KIM R. HARDMAN, KENNETH R. COVINGTON, MICHAEL E. VALENTINE, GARY L. YANKEN, PATRICK M. HERRLEY, MIKE I. CARLSON, RANDALL O. SWARTHOUT, SAMMY L. CROSS, DARRELL D. MILLER, RONALD L. STODDARD, JAMES D. TOLLE, LARRY S. CLARK, ROBERT T. EPLER, RICHARD W. CAVENDER, DALE YOUNG, ROBERT F. MCINTOSH, JULIAN R. NELSON, WALTER T. GRONEK, RONALD E. OSTENDORF, RONALD R. JOHNSON, MELVIN E. SAYRE, ROBERT F. LANNON, GERALD T. DUELING, PHILIP J. EBERHARDT, ROXIE L. JACKSON, RUSSELL P. EGGERS, RON G. VAN

Appendix G

NORTWICK, THOMAS M. MCMURTRY, LARRY R. MANN, MAURICE F. MCDONALD, DONALD A. RASCHKE, CLEO D. SCHROEDER, KENNETH W. MCINTOSH, ROBERT A. PODJENSKI, GILBERT R. THROM, DONALD K. PETERS, ROBERT G. WENZEL, CECIL B. MILLER, LEROY W. ROTH, JAMES L. WELLS, CHARLES F. SMARTT, JAMES W. JENKINS, JOHN J. STAMATE, GERRY W. SPINDEN, DAVID E. DUPREE, DONALD R. SMITH, JAMES P. MANARY, RONALD B. HUNT, ROBERT E. WILLIAMS, DENNIS J. SMITH, GARY E. METCALF, BENNY L. COVINGTON, ROBERT E. WEDGWOOD, NORMAN R. THOMAS, JON L. STONE, STEVEN L. BROWN, JOHN R. HOLLOWAY, WARREN H. BUSH, EDWARD W. BERARDINO,

Plaintiffs,

vs.

UNION PACIFIC RAILROAD COMPANY, a Utah Corporation and UNITED TRANSPORTATION UNION,

Defendants.

STATE OF WYOMING)
) ss.
COUNTY OF LARAMIE)

AFFIDAVIT OF RICHARD RIDEOUT

I, Richard Rideout, being first duly sworn upon my oath, state and depose as follows:

1. I am co-counsel for the Plaintiffs in the above-entitled matter with Mr. John W. McKendree, of Denver, Colorado. The

statements that I make in this affidavit are based on my personal knowledge of the facts related to this action.

2. The Initial Pretrial Conference ("the Conference" or "the IPC") in this case and in the companion case of *Smith, et al. v. Burlington Northern Railroad Company and United Transportation Union*, No. 93-CV-210-B was noticed on September 9, 1993 and scheduled to be held on September 17, 1993. I participated in the Conference by telephone as I was out of town on that date and Mr. McKendree was out of the country. Local counsel for some of the Defendants attended in person and other counsel participated by telephone. Mr. Broder, who represents the United Transportation Union ("UTU"), also participated by telephone and was connected in a conference call with me to the Magistrate, Hon. William C. Beaman, who conducted the IPC.

3. At the Conference, counsel for the Burlington Northern Railroad Company ("BNRC"), Mr. George E. Powers, Jr., made a request to the Magistrate that any and all discovery be stayed, including the self-executing, routine discovery required by Rule 26 of the Local Rules for the United States District Court, for the District of Wyoming, pending resolution of their Motion to Dismiss as discovery was unnecessary to the resolution of the dispositive motion and would be time consuming and expensive. Mr. Powers had previously advised me by letter dated September 16, 1993, and orally before the hearing, that he would be requesting the stay, as discovery was unnecessary to the resolution of the BNRC's Motion to Dismiss, which was directed only to the legal issue of whether the district court had "subject matter jurisdiction" over the action. Therefore, no discovery was required or necessary.

4. After discussion of miscellaneous scheduling issues of the type and kind normally addressed in an IPC, the Magistrate brought up the subject of the requested stay before Mr. Powers made his oral motion, and after a very brief argument, granted BNRC's oral motion (no formal motion was ever filed) and ordered all discovery, including the self executing, routine discovery, stayed pending resolution of the dispositive motions. I raised the issue with the Magistrate of whether the Plaintiffs might need some discovery prior to resolution of the pending motions, as both of the parties who had then filed their motions to dismiss (the BNRC and the Union Pacific Railroad Company; the UTU had not, as yet, filed their Motion to Dismiss, but indicated that it would be filed shortly) had appended materials outside of the pleadings to their motions and supported the same by affidavit, and I objected to the stay to the extent that it would deny to the Plaintiffs an opportunity to respond to the appended material. The Magistrate advised me that if, after a review of the pending motions, the Plaintiffs believed that they needed some limited, directed discovery that would relate to the issue of the subject matter jurisdiction of the court (i.e., the issues raised in the pending motions to dismiss), that the Plaintiffs should raise the issue with him and he would consider it at that time.

The stay order is set forth on page 3 of the court's Order On Initial Pretrial Conference dated and entered on September 20, 1993.

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allow them to proceed with discovery directed at any other legal or factual issues as none was or is necessary to address the legal issues raised in the Defendants' dispositive motions.

6. The district court subsequently, on it's own motion, without notice, converted the pending motions to summary judgment motions and ruled on one claim (the "disparate treatment" claim) on the basis that the Plaintiffs had failed to submit sufficient evidence to withstand a grant of the Motion in the Defendants' favor.

Further Affiant Sayeth Naught.

s/ Richard Rideout
Richard Rideout

STATE OF WYOMING)
) ss.
COUNTY OF LARAMIE)

Subscribed and sworn to before me by Richard Rideout this 17th day of October, 1994.

Witness my hand and official seal.

s/ Ruthmary L. Manners
Notary Public

[SEAL]

APPENDIX H — MOTION PROCEEDINGS DATED NOVEMBER 4, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

93-CV-209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

vs.

UNION PACIFIC RAILROAD, a Utah corporation, and UNITED TRANSPORTATION UNION,

Defendants.

AND

JEROME J. SMITH, et al.,

Plaintiffs,

93-CV-210-B

BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware Corporation; and UNITED TRANSPORTATION UNION,

Defendants.

Appendix H

MOTION PROCEEDINGS

Transcript of Motion proceedings in the above-entitled case before the Honorable Clarence A. Brimmer, Judge, Cheyenne, Wyoming, held on the 4th day of November, 1993.

Court Reporter:
MICHAEL ALAN SMITH
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BY MR. GEORGE E. POWERS

Appendix H

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[3] For the Defendant Union Pacific:

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Appendix H

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[4] PROCEEDINGS

(Motion proceedings commenced

9:00 a.m., November 4, 1993.)

Good morning, ladies and gentlemen.

Appendix H

We have the cases of Hiatt, et al, vs. the Union Pacific, and Smith, et al, vs. Burlington Northern and United Transportation Union, of course, on defendant's motion to dismiss.

I have no particular preference as to who wishes to proceed first, but I'll be glad to hear George.

MR. POWERS: With the Court's permission, I'll be happy to go first.

THE COURT: You look like you're ready and willing and eager.

MR. POWERS: Thank you, Your Honor. Before I start, I would like to introduce counsel for the railroad, Mr. Larry Stroik, who has entered an appearance in this case.

THE COURT: I think he's already been admitted and we're glad to have you with us.

MR. POWERS: Your Honor, these plaintiffs have come before the Court to ask that they want the Court to rescue them from the consequences of their individual voluntary decisions, decisions which they made many years ago under prior labor agreements. As a result of those individual decisions and as a result of subsequent acts of Congress, which were and are [5] binding on all the parties before this Court, the plaintiffs have now had to accept the promotion to conductor status — to have brakeman seniority move into the conductor status seniority when they changed bargaining units.

This is not a case of age discrimination by any stretch of the

imagination. The changes which were demanded and implemented by the railroads and the union in this action were applied.

It is not even elected that these plaintiffs were discriminated against when their situation is compared to that of other non-promoted brakemen who had not accepted promotion to conductor status under prior labor agreements. The 1991 crew agreement is the child of a historic decision by Congress.

Congress imposed a sweeping federal solution upon a labor impasse which had defied solution between the railroads and the unions for years. Congress established a new playing field, which looks forward toward — would guide us in the field of labor relations into the future.

Congress essentially made three decisions and imposed upon all the parties three primary facts.

Number one, under prior labor agreements there had been what are known as local moratoriums, which precluded railroads and unions from bringing up to the Crew Consist — in the absence of the mutual agreements they could not file a Section 6 notice and bring it forward for the mandatory [6] arbitrator, it had to be by mutual agreements. The railroad suggested that the unions would refuse the impasse. It grew.

Congress stated when it adopted the recommendations of the Presidential Emergency Board No. 219, that these local moratoriums would be lifted. The previous agreements would not govern future negotiations. This issue was going to be brought for motion and going be to decided once and for all.

Appendix H

Another issue that Congress decided was the brakemen would have to accept promotion to conductor status. Under prior labor agreements, brakemen had the opportunity to voluntarily promote to conductor status. An opportunity was extended to all brakemen and repeated. It was extended to these plaintiffs. They chose not to accept it. They chose to remain and pursue their employment under the brakemen seniority.

Congress said to brakemen in the 1990s and into 2000 and beyond that there's not going to be work for you, there is no work for the brakemen to be going on through runs due to advances in technology, advances in training. You're going to have to accept promotion to conductor status. We're going to change the other terms of employment pertaining to the conductor. You're going to become conductors.

Having now opened the door to the negotiations, Congress put one more kicker in the pool. And that was they told the parties that you are going to negotiate these new [7] agreements and you're going to be open to binding arbitration. And, therefore, you should get about your business and negotiate and review the interpretation of PEB 219 in light of the Special Board findings. Otherwise, be prepared to accept the consequences. And in binding arbitration the issue is going to be decided in 1991.

Nobody in this courtroom can seriously question the power of Congress.

The United Transportation Union attempted that at one time, however. That case was decided in the matter of United Transportation Union vs. Burlington Northern before the DC Circuit, 1993. That court held that the Presidential Emergency Board of the Special Board of Congress all — the Special Board

acted pursuant to the mandate from Congress. Congress acted with the commerce clause powers.

Even these plaintiffs today do not argue, and I think they know that it would be foolish to argue that there was anything irregular or improper before — about the proceedings before the Emergency Board, Congress and the Special Boards. Thus, even these plaintiffs will now say that all they are here to do today is argue about the 1991 Crew Consist Agreement.

But then again, you turn to the question of what is it that they want? They want special favors from this Court. They want this Court to rescue them from the present consequences of those past decisions when they passed up their [8] opportunity to take promotion.

They want this Court to revive and restore benefits which accrued under prior labor agreements, which were swept aside by Congress when it accepted the recommendations of the Emergency Board.

They want this Court to reward them enhanced rights at the expense other employees who accepted the voluntary opportunity to take promotion, establish their seniority as conductors, took and accepted their junior status, worked and earned their present seniority. These plaintiffs are not entitled any relief under the Age Discrimination Employment Act or any other theory.

The reasons these plaintiffs chose not to accept promotion under prior agreements were purely personal and economic. They took the benefits of their brakemen seniority and used those to guarantee themselves access to better runs, access to better working hours.

While they were doing that, other employees were passing them by and taking the promotion to the conductor boards, establishing their seniority and working their way up that board. It's the same seniority system in both cases. The plaintiffs accepted the benefits of that seniority system in the brakemen's pool throughout the '70s, through the '80s.

Now, it is Congress that told them they are to exchange bargaining agreements going to the other pool. They [9] also have to accept the consequences of those decisions. At this point this Court cannot fashion some relief which will save them from those consequences.

The plaintiffs say that the railroads and the unions did not negotiate the 1991 Crew Consist Agreement in a way that would allow them to dovetail; in other words, in a way that would allow them to reserve those benefits. There is no such requirement under the Age Discrimination Act. We cite the Court to the Cova case, the Williams case and the Parcinski case, all of which hold that the railroads are employee unions. As a labor organization, they are not required to favor older-age protected workers, they are not required to show them favoritism.

As explained in the Bovers case, the Age Discrimination Employment Act does not guarantee age-protected employees that will never suffer some adverse impact in their employment. It only says that you will not be discriminated against because of your age. There is no showing here that the promotion of non-conductor brakemen was at all age related. Any such inference is refuted by the findings of both the Nebraska Employment Opportunity Commission as well as the United States Equal Employment Opportunity Commission.

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We reviewed these cases when they were filed, respectively, in Nebraska against Union Pacific and the Burlington Northern Dallas office of the EEOC. Both cases [10] explained this was age employment, age throughout. It cut across all classes.

There is no evidence, there is no pleading which would suggest otherwise. The only comparison that these plaintiffs show up in their complaint is in paragraph 62 of the amended complaint against Burlington Northern where they say we have received mistreatment from other brakemen who established seniority rights as conductors in prior labor agreements.

That's right, other brakemen who had qualified for the position of conductor, a position that these brakemen were not qualified for. When Congress said they had to accept promotion, they had — under examination, they had to qualify for the position before establishing seniority and join that pool.

They're comparing apples and oranges, Your Honor, and asking this Court, again, to use that to fashion some special favor.

THE COURT: I take it there is a special test, a written test, I presume, that they have to pass to be a conductor?

MR. POWERS: There are tests that they have to take, Your Honor, to assume the position of conductor that involves different responsibilities than a brakeman. It involves, basically, the conductor's individual responsibility for the train, everything from the engine back. The brakeman is simply [11] a man who does what switching might occur or handling cars. It is a different position, different qualifications. It does require further examination. Different rules apply.

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The brakemen in this case voluntarily passed up their opportunity to seek promotion and take those exams back in the '70s and '80s. Now they're saying, "Judge, we passed up that opportunity so we could enjoy the benefits of the brakeman seniority back there where we got the good hours. While they were back there doing all of that, the other ones are going past us. We knew it at the time, but, gee, now that Congress says we've got to become conductors, I want you, Your Honor, to open up a place in the line ahead of all these other people and let me cut in front." The Age Discrimination Employment Act doesn't require it.

In essence, Your Honor, if there is any dispute here at all, what you have is a classic dispute involving terms of employment in terms of concerning hours of service. You have a classic case of a minor dispute under the Railway Labor Act.

This is a case, if we accept the plaintiffs at their word, which involves the interpretation and application of the 1991 Crew Consist Agreement. That is a case which falls within the exclusive jurisdiction of the National Railroad Adjustment Board and the practices and procedures under the Labor Act. It is a case in which the court does not have jurisdiction.

For all these reasons, Your Honor, I would ask this [12] Court to dismiss the present complaint. It fails to state a cause of action upon which relief would be granted. It is outside of your jurisdiction. You cannot revisit the decisions that Congress made. You cannot wade into the Labor Agreement pursuant to the Railway Labor Act which granted exclusive jurisdiction to the National Railroad Adjustment Board.

Thank you.

THE COURT: Thank you, Mr. Powers.

What's your preference? Do you want to argue one at a time or do you want to argue them before —

MR. RIDEOUT: Mr. McKendree from Denver will make the argument. He would prefer to wait until the defendants had all finished.

THE COURT: Mr. Rogers?

MR. ROGERS: Thank you, Your Honor.

Two preliminary matters. First, the Union Pacific did file a reply brief today in response to the plaintiff's responsive brief. That was served upon plaintiffs yesterday. And I have an extra copy for the Court if —

THE COURT: Well, it's in the file, Roger — no, wait. Not today's reply brief. There was a Burlington Northern reply brief that was filed on November 10th.

MR. ROGERS: I have a copy for the Court. And the argument on behalf of Union Pacific Railroad will be made by Brenda Council from Omaha. She's been admitted for purposes of [13] this case.

THE COURT: Fine. We are delighted to have you with us.

MS. COUNCIL: I'll be brief.

THE COURT: You don't need to be. The jury trial finished at 10:00, so we've got all day.

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MS. COUNCIL: I will be brief because Larry, counsel for Burlington Northern, has eloquently stated the basis of the union's beliefs that plaintiff's motion and complaint should be dismissed. I just want to reiterate a couple of the points.

We firmly believe that this case must be dismissed for plaintiffs' failure to state a claim on which this court, and for that matter, any court, could grant any relief because of the fact that the 1991 agreement, which is at issue in this case, was the result of a congressional mandate and notwithstanding the plaintiffs allegation to the contrary.

All the actions taken by the railroads, Union Pacific and Burlington and the action take by the UTU, were all pursuant to the directives of Congress.

I wanted to specifically point out this morning, Your Honor, in response to plaintiffs' opposition where they indicate that there was no congressional intervention or no governmental intervention mandating this agreement. I must say that but for the PL 102-29 there would not have been a 1991 agreement because of the fact, as Mr. Powers has indicated, [14] these Crew Consist Agreements that existed prior to 1991 had the local moratorium in there which prevents the railways in serving Section 6 notices and proceeding to the mandatory operation.

Two, in order to reopen that, there was consent that was not forthcoming at that time. That, in fact, when the carriers served their respective Section 6 notices in the national negotiations and raised the issue of Crew Consist at the national level, UTU specifically objected to the carriers doing that. And that's why the carriers submitted the Section 6 notice that they did, which set up a quid pro quo. If there would be no Crew Consist reduction in the

income of the number of members on the train, then the carriers ought to have wages reduced.

PEB 219 considered the union, the carrier proposal, in that it specifically said that we really can't require the Crew Consist negotiations as a part of this. But we can grant wage increases requested by the unions. But in exchange for that, require negotiations on the Crew Consist, and, if necessary, arbitration.

And I think it needs to be stated, Your Honor, that these plaintiffs, as other trainmen covered by PEB 219, did benefit.

THE COURT: So you're saying now they're enjoying the benefits of their bargain and not enjoying the disadvantages of [15] it?

MS. COUNCIL: That they have enjoyed it because of the bargain when this agreement was ratified. But this specific craft then became effective in February.

Now George Powers has stated, in which I'm in agreement, and the Court has in all of the pleadings the case of —

(Interruption.)

THE COURT: Mr. Smith is in his apprenticeship here with us, and he's working up to speed.

MS. COUNCIL: I apologize. In your pleadings as well as in the Burlington pleading we directed the Court's attention to the case of the United Transportation Union vs. Burlington Northern, where Judge Green and subsequently the district circuit court of appeals for the DC circuits, filed that Congress had acted well within the commerce power inexplicitly.

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THE COURT: That's the same Judge Green who achieved fame in the telephone controversy, that's not even regarded as great authority.

MS. COUNCIL: We believe this case is great authority. And Judge Green there relied specifically and the circuit court cited the Brotherhood of Locomotive Engineers vs Chicago Rock Island Railroad, where the Court there specifically stated that Congress unquestioningly has power under the commerce clause to regulate the number of employees [16] who shall be used to man trains used in interstate commerce.

And that is essentially what was done via PL 102-29 where Congress was mandating the number of employees who shall be used in trains.

And as a part of that process provided for those individuals, whose positions were being eliminated, the brakemen, to move and be promoted to the conductor ranks, specifically required that there be provisions made for mandatory promotion of those brakeman to the conductor ranks. In the pleading we filed this morning, Your Honor, we attached the copy of a decision of a judge in the Southern District of Texas where the issue of Crew Consist under PEB 219 and PL 102-29 was placed in issue. They're unlike this case.

Union Pacific Railroad Company and the United Transportation Union did not enter into an agreement on Crew Consist. They were unable to do so. And as a result, The railroad invoked the provisions of PL 102-29 mandating merits arbitration on the question of Crew Consist.

We went to the arbitration panel and there the UTU was able

to successfully argue our side to the arbitrators that their moratorium provision prevented any Crew Consist Agreement. The arbitrators agreed and dismissed the arbitration. Union Pacific then filed a declaratory action in the Southern District of Texas arguing that the arbitrators had no right not to follow the mandate of Congress as specifically [17] mandated on arbitration, on the merits, if the parties were unable to reach an agreement.

Judge Black, relying on the decision of the Honorable Judge Green, found in favor of Union Pacific and held that there must be a merits arbitration.

And I cite that case and provide that case to the Court, Your Honor, for the purpose of establishing the fact that there was going to be a Crew Consist award, if not an agreement having been reached, that the parties were following the mandates of the parties by entering after the agreement that if they did not have arbitrations of the provisions, PL 102-29 would have been invoked and there would have been a reward on the question of a Crew Consist Agreement along the lines of requirements set forth in PEB 219 and the modifications provided.

So, in summary, Your Honor, Union Pacific firmly believes that plaintiffs have failed to state a claim upon which this Court can grant relief that the parties were acting in accordance with a congressional mandate; that no one can question the authority of Congress to so direct; and that the parties here are bound by the congressional mandate and results of that in the form of this agreement.

And I'm open to any questions that the Court may have of me at this time.

THE COURT: Well, I don't have a lot of questions [18] this morning. I apologize to all of you for that, but —

MS. COUNCIL: We also adopt the argument, and it's in our pleadings, that we believe that if the case is not dismissed on the basis of the congressional mandate, that it must be dismissed under the Railway Labor Act.

THE COURT: Thank you, Ms. Council.

All right. Mr. Pickering?

MR. PICKERING: Your Honor, I'm appearing on behalf of the United Transportation Union, and with me at the counsel table is Mr. Kevin C. Brodar, who is, again, counsel for the United Transportation Union. He has been previously admitted before this Court four months ago and admitted also for purposes of this case. With the Court's permission, he will be presenting argument on this matter.

THE COURT: Mr. Brodar, I'll be glad to hear you.

MR. BRODAR: Thank you, Your Honor. I'll try not to hit the same points that counsel for the railroad have touched on since we do have some separate ones.

THE COURT: Mr. Brodar, in this court repetition is nothing new.

MR. BRODAR: I hate to have to say that I agree with the railroad counsel, that rarely happens. So I'll try to keep that at a minimum.

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In their — in the plaintiffs' reply brief in their opposition brief, they state that they're not really [19] complaining about conductor promotion, they're complaining bout the work they have and hours they keep. They seem to be making a distinction without a difference. The reason they have to is because of the Public Law 102-29. You can't separate those two. That's why they have to work the hours that they have to work.

With regard to what could have been done differently, Plaintiffs are going to say what could have been done by UTU Pith regard to 102-29. We did everything we could do. We opposed the mandatory promotion, we opposed it before the PEB, we had a strike over the issue. We even challenged the very individuals. I don't know what more we could have done.

If you look at Local 1389 vs. UTU, which is the case attached to our motion to dismiss, which is the case from the District court in Kentucky, it's a duty-of-fair-represention case.

The Court found there that the UTU did everything they could do. And in reading that case, especially pages 4 through 8 where the Court lays out the plaintiff's statement that the UTU did not properly negotiate an agreement with the Crew Consist Agreement, basically the same thing the plaintiff's are saying now. "Okay, you are stuck with 102-29, but you did negotiate an agreement."

THE COURT: To what extent had the nonconsenting brakeman, by living under this agreement, by not accepting the [20] promotion to conductor, enjoyed benefits under it?

MR. BRODAR: Prior to 19 —

THE COURT: No, since the agreement — since counsel argued they couldn't have their cake and eat it, too, and that they were enjoying the benefits of-better runs and better Conditions, to what extent do you agree with that?

MR. BRODAR: I'm not sure that I'm following.

THE COURT: Well, after the union negotiated the agreement and the brakeman, then the question is, did the nonconsenting brakemen have some benefit under that agreement by better runs or better conditions or whatever, so that there Were benefits benefited, and, yet, now they're trying to repudiate the agreement that the union negotiated for them?

MR. BRODAR: To a degree — and excuse me if it seems that I'm trying to evade the question, because it depends on which — as I understand the law, the benefit is to us or not.

Essentially there were wage increases put in in PEB 219, and these wage increases were craftwide, so there were certain benefits to them in ratifying 219. There were certain health and welfare benefits, there were —

THE COURT: Benefits. The numbers of increased wages and increased health benefits.

MR. BRODAR: You can say there were increased health benefits.

THE COURT: All right. Now, I don't want to put you [21] on the spot. I'm trying to understand this.

MR. BRODAR: Essentially the 219 was a resolution of

outstanding issues, really, throughout the railway industry. It wasn't just mandatory promotion or Crew Consist Agreement, those happened to be two of the major issues, the income issues and a number of health and welfare and various other issues that really don't play a part here. And how we view that in the final resolution is a give and take. We aren't happy with 219 overall. But there were certain benefits to 219. Although, I guess I should deny that if that ever comes up.

THE COURT: I think I've got the gist of it. That there's a lot of give and take as there always is in any labor negotiation, and, as a result of it, an agreement came about, and there were some advantages and some disadvantages.

MR. BRODAR: Now the interesting thing about this is if the parties are in negotiations and they reach half agreements or if they don't reach an agreement, there's a strike. And then the economic warfare under the Railway Labor Act, if the parties don't reach an agreement, the president can appoint PEB 219.

THE COURT: Which is what happened.

MR. BRODAR: Then it dictates terms of the agreements, which is what it did here. After dictated, we went on strike, we were put back to work by Public Law 102-29, which said it is not only a PL right, 219 is now going to the [22] agreement whether you like it or not. That's what we are stuck With. Then they try to challenge 102-29, which Judge Green gold us that it wasn't worth the page it was written on.

THE COURT: All right, Mr. Broader.

MR. BRODAR: I want to get back with regard to the —

THE COURT: I guess you're telling me that the union did the best that it could and these people have their nerve to sue you.

MR. BRODAR: Generally, that would be a pretty good summary.

(Laughter.)

MR. BRODAR: That's pretty much it. The one thing with regard to the dovetail, suggesting they somehow — the work got dovetailed. That would certainly be unique to anything that has ever been done in the past of the railroad industry. And not only is it impossible to do something like that, to satisfy these plaintiffs' failure to exercise the fight they had, we would have been hit with probably 1,000 off-duty-representation claims from conductors who would now be moved down the nine north list because people who never worked s a conductor never had a conductor seniority. But it doesn't sit well, to say the least.

I want to make it clear there are two separate craft laws. You have brakeman, as a separate craft, and it has its own seniority system. These plaintiffs decided to stay in that [23] seniority system and they move up to the top of that craft.

Other people who are in the same situation who decided to take the conductor promotion, they took conductor promotion and started at the bottom.

THE COURT: And on the conductor's side?

MR. BRODAR: And they took the bad runs and the bad hours. They were working up, Your Honor, to being in the good slots. The plaintiffs had the same opportunity to do it. They

didn't. The reason they're where they are is their own decision. And I would agree with counsel for the railroad there is no ADEA claim. And EEOC found out that what happened here was an elimination of the unnecessary work, and it cut across all age groups, not just forty and above.

THE COURT: The Court has a little background in that, in that when I was a youngster I had a favorite uncle who was a brakeman and conductor on the UP, but that's been 50 years ago.

All right. Anything further, Mr. Brodar?

MR. BRODAR: Nothing, Your Honor.

THE COURT: All right.

Mr. McKendree?

MR. MCKENDREE: Good morning, Your Honor. I appreciate the opportunity to appear before you this morning.

I don't know how to do with this without taking a little bit more time than has been taken by my colleagues on [24] the other side. I appreciate your earlier comments.

THE COURT: We've got plenty of time.

MR. MCKENDREE: To understand this dispute clearly, it's the assertion of the defendants that they can look back into history and point out to Your Honor that the plaintiffs ad the opportunity to take a promotion but did not do so.

It is somehow improper for the plaintiffs to point out to this

Court that when they didn't, they were promised here would be no harm that would befall them if they stayed in heir position.

That these matters are a result of a most recent collective bargaining agreement prior to the current Crew consist agreement at issue indicated that the loss of people populating the brakemen title would occur by attrition. And technological advances, profit and needs, money drove the Section 6 notice. It's that I'd like to spend a moment or two to address.

THE COURT: All right.

MR. MCKENDREE: Because I think it is important for our Honor to understand what the plaintiffs are not complaining about.

It's important, I think, for Your Honor to understand the box, that you understand as a former general counsel of the labor organization, that the UTU was in. When it came to the end of that, which I'm about to read, it describes "It's time [25] to open the contract for negotiations." At that period of time the Crew Consist issue is in a state of moratorium. They, by virtue of the status — the Section 6 notice, could be utilized to the carriers to force the union to negotiate on the Crew Consist Agreement issue, but the carriers wanted to do away with the title.

They wanted to do away with the title even though they're brakemen who had been with them for a number of years, Were assured in the past that when it was done, their job was None away with, it would be by attrition.

So the carriers fashioned a bargaining proposal in their Section 6 notice in response where they cast the issue of the Crew

Consist in terms of the wage package to the bargaining units at issue.

And, in effect, the carriers proposed a wage decrease for the employees, unless the union would agree to do away with he moratorium so that they could negotiate away the brakemen title. And the union correctly fought in the plaintiffs' view.

And what happened was, under the administration of the dispute involving the machinery under the Railway Labor Act, after threatened strikes and what have you occurred, the President of the United States established the PEB 219. And that Presidential Emergency Board made recommendations, which, in effect, noted that it did not have jurisdiction or power to change the problem because of the moratoriums, but recommended, [26] given the wage stance position that the industry was taking in their negotiations, that there be some relief to the carriers an the brakemen Crew Consist issue. And the union correctly resisted that. Ultimately to the operation of the Railway Labor Act, Congress enacted Public Law 102-29.

And in that Public Law — let me just pause and say that's the same Congress that enacted the ADEA, the same Congress that's presumably knowledgeable with reference to what the legal obligations are of parties to the collective bargaining process to obey all of the laws, including laws seemed that are regulated by the Interstate Commerce Clause in the United States Constitution dealing not only with Title VII discrimination or ADEA discrimination by environmental Protection issues, mineral wage laws, the whole gambit of legal requirements that parties have when they go to sit down and to bargain an agreement. Congress didn't waive any of that. It did say, however, that in your negotiations if you can't settle this dispute any other way, it will be done by arbitration.

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In your negotiations you negotiate a Crew Consist Agreement or the moratorium is caput, it's no longer a part of this process. The union can't rely upon the fact that there's no moratorium, that the moratorium precludes the agreement from being negotiated. You negotiate a Crew Consist Agreement and that does away with the brakeman title, it does away with the brakeman title quite naturally. It didn't say — it didn't say [27] anything more than you have to provide a job for these brakemen. And the way Congress couched that phrase was to say that they had to take that promotion.

Now, taking promotion simply recognizes, we respectfully urge, Your Honor, that there was no brakeman position left. If they wanted to stay on the payroll, these people in these bargaining units for these two railroads had to become conductors.

THE COURT: To what extent did the brakemen through negotiations with their representatives in Congress negotiate that?

In other words, what I'm thinking of is that they negotiated a deal where they could be bought out prior to the time this happened. The brakemen obviously didn't go that route.

MR. MCKENDREE: Well, the brakemen, if I may, Your Honor, just comment, were not separately represented. They're union. They were, the evidence will show, I believe given the opportunity to go forward with the discovery aspect of this case, as we will urge we're entitled to.

We'll show that the vast majority of the membership of the UTU is made up of conductors or brakemen who also have had

conductor titles and had excepted promotion to conductor, had earlier received a conductor seniority date and they had the clear ability to outvote the brakemen. That's not an issue [28] that we raise in this lawsuit, it's just a simple statement of fact.

THE COURT: I see.

MR. MCKENDREE: But the union represented both the brakemen and the conductors in these negotiations.

So it is the plaintiffs' position that when the carriers here and the union sat down at the bargaining table wherein they were mandated by Congress of the United States to negotiate a Crew Consist Agreement, that a duty to negotiate that agreement was recognized by Congress. It ought to have been recognized by the parties to this dispute. And they had an obligation to negotiate that agreement in accordance with the mandates of law.

There is no exception in that regard from the Age Discrimination Act, so no exception from the UTU. The mere fact that this industry is regulated by the Railway Act goes to show the greater extension from the administrations and obligations created by ADEA than does the other industries in interstate commerce who are regulated by other labor relation acts.

So when they sat down at that table, they had the following duty that the plaintiffs do not contest, and the duty which the plaintiffs don't believe was usurpation of some kind by the Congress of the United States or the President, then they enacted Public Law 102-29. 29

[29] They had to negotiate a Crew Consist Agreement that mandated the job title for trade with the conductors. All other

terms and conditions of what was contained in that Crew Consist Agreement Congress left to them to negotiate. That's why Public Law 102 says "Go negotiate it." Public Law 102 didn't establish the Crew Consist Agreement that is in effect. If Public Law 102 had established this current agreement, the arguments that are being advanced, particularly by Burlington Northern and Union Pacific, would be more relevant.

What Congress mandated was, "You're going to negotiate the terms and conditions of your employee complement," a Crew Consist Agreement that means there would be no brakemen, they were free at that time at that point to negotiate those terms and conditions that either violated the ADEA, as we allege they did, or to negotiate one that complied with it.

What is absent from this record, because it is so early on in the initial stages of the plaintiffs' complaints and because the plaintiffs weren't there in negotiations, is what consideration, if any, these parties gave to the obligation that they had to these plaintiffs under the Age Employment Discrimination Act, because the evidence is clear from the affidavit submitted and attached to —

THE COURT: Let's go back. You said the plaintiffs weren't there in the negotiations. Weren't they really? [30] Wasn't the union representing them?

MR. MCKENDREE: The union was there, yes, and it's conclusive.

THE COURT: And it had a duty, as has been observed, of fair representation.

MR. MCKENDREE: They sure did. And they had — that isn't the only duty that the union had. It also had the duty in discharging its responsibilities to bargain, not to violate the Age Employment Discrimination Act. And there's case after case, many of them are cited in the memorandum, Your Honor, which states it is possible for a collective bargaining agreement to be violative of the Age and Employment Discrimination Act even in an industry regulated by the Railway Labor Act.

THE COURT: Well, I guess at some point I've got two questions. The first is what material facts were obviously converting these motions to dismiss, and, two, the 12(b)(6) motion for summary judgment? And the issue is what are the material facts in issue that have to be proved by trial?

And then I would appreciate if it you will walk me through your concept of how ADEA was violated by negotiations.

MR. MCKENDREE: Sure. Okay. Let me address the first one first, if I may.

THE COURT: Take them in any order.

MR. MCKENDREE: Thank you, Your Honor. One of the [31] legal issues for which this is a factual dispute that is clearly material is whether or not, as Burlington Northern and Union Pacific suggest, compliance with Public Law 102-29 meant they had to enter into the disagreement that they entered into.

THE COURT: Isn't that legal?

MR. MCKENDREE: The issue that is raised by the plaintiffs is that the duty is no greater than the duty to negotiate

just that. Once the negotiations came in, the legal obligations under the ADEA was presented to them. So since the evidence shows — and it may or may not be disputed, and I can't recall, I apologize, Your Honor.

I received the Union Pacific memorandum reply brief at 5:30 last night and haven't had a chance to read it or study it. Although I'm familiar with the case that is cited to, I'm a little more familiar with the Burlington Northern reply memorandum. We have all had compressed time in this case, and part of the reason for the compression of time was my own schedule. It's just a simple statement of fact, as I stand here in front of you, Your Honor.

THE COURT: I understand.

MR. MCKENDREE: But the affidavits attached to the plaintiffs' memorandum in opposition demonstrate, one, knowledge that both the carrier and the UTU's had with reference to the composition — the age composition of the plaintiffs. The plaintiffs' principal theory is either mixed [32] motive or disruptive treatment, neither of which have been raised by the defendants, any of the defendants, in their memorandums, unless it is in Union Pacific's that I received late last night.

Attached to the lead plaintiffs' affidavits are seniority rosters that indicate and provide evidence that clearly the parties, when they sat down to discharge this duty to negotiate that which Congress and the President imposed upon them, were aware that the ages of the brakemen in the class that the plaintiffs represent, of the quality of the plaintiffs, those kind of brakemen, were substantially older than the remaining work force.

They have already commented that they were aware of how,

if they approached the bargaining table, if they did not accommodate in some fashion the age, that they would go to the bottom of the seniority rosters, because that's the way it's always been.

There's no obligation established by either the — excuse me — the Railway Act, nor is their obligation established under the process of collective bargaining or binding precedent. That's the way it's always been is the way it has to be in this unique situation.

Older employees' jobs were done away with pursuant to a plan of Congress, and the union didn't like it, as witnessed by the efforts before Judge Green, but they still had to do it.

[33] And when they did it, they were aware and had knowledge that they were dealing with people in the protected age group. And obviously the reverse of that knowledge was they were dealing with people who were in a nonprotected age group and in an environment where the collective bargaining agreement could compute a form of discrimination and had a duty to address that and didn't, insofar as the plaintiffs know. But the plaintiffs' knowledge concerning what transpired in negotiations is, of course, Your Honor, limited to an examination of the Crew Consist Agreement decision.

In addition, you have heard particularly from my esteemed colleague from Union Pacific discuss the benefits that were gained by the brakemen, in Union Pacific's view, by disagreement. I would urge Your Honor to examine the affidavits attached to our memorandum and our position, because those affidavits will reveal and the evidence in this case will ultimately establish that the brakemen — on a monthly basis the brakemen,

plaintiffs, were earning less money than they did in the past, working greater hours then they did in the past. I've interviewed brakemen whose sons and daughters have gotten better jobs because they chose early on to take that promotion to conductor, and their father is now in a position where he is behind them.

There is nothing wrong with that, maybe, if you examine seniority in the abstract, nothing wrong with that, [34] maybe.

The point I'm trying to make is that the suggestions here is that somehow these plaintiffs are trying to force Your Honor to change the agreement by seniority dovetailing. That's not true. What these plaintiffs seek is a remedy for the discrimination that's been visited on them that has to be fashioned from the evidence that has yet to be adduced in this case because of the early stage it's in.

One possible remedy may be dovetailing, or dovetailing may be the worst possible remedy. There's no way to know at this stage — at this early stage.

But that was an alternative these parties could have discussed when they had a duty mandated by Congress to negotiate a new Crew Consist Agreement without brakemen title as well, as you will see from the examination of the affidavits attached to our memorandum, or recognition that the hardest work, the most physically demanding work, the work that takes the longest hours, that work that everybody in their entire career with their respective carrier got rid of, oh, 20, 30 years ago now, falls on these plaintiffs to perform. And they knew that when they sat down at the bargaining table.

They could have, instead of dovetailing for whatever reason,

negotiated some sort of work distribution or redistribution, something designed to make sure that the adverse actions from the decisions they were making at the [35] bargaining table did not fall primarily on the older workers, which is violative, we believe. So neither are there special favors, as has been suggested.

Neither do these plaintiffs seek to be rescued from prior decisions that they make when they reasonably relied upon then existing promises that their jobs would be done away with through attrition. Therefore, the exercise of the opportunity as is set forth in the affidavits attached to the memorandum, Your Honor, to make more money to care for and spend more time with their family, were not made with some malicious or negligent thought process designed to ensure that they could take away interest, some right from a younger worker later on when events, unknown to anybody, occurred. It was reasonably reliant at that time and ought not to be penalized for it at this bargaining table as a pretense or an excuse from the discrimination at issue.

I kind of went through the history of what happened in this dispute.

To pinpoint what I think is the strongest most material issue of fact presented in this case at this juncture is the absence of any evidence on the part of these defendants contradicting the evidence produced and/or the presumption that we are entitled on the status of our pleadings at this early stage as to what happened in the negotiations.

There's not one shred of evidence that these [36] defendants have put forward that indicates that when pursuant to a congressional mandate they started to bargain a new Crew

Consist Agreement for the crews would be made up of one title. That they did so in compliance with their obligations under the ADEA.

Whereas, the evidence that we have produced indicates, one, knowledge that the disparate impact would occur in advance.

Two, seniority rosters which would indicate even if you — I mean, let's face it, Your Honor, if you have an agreement that says we'll do away with the brakemen through attrition as time goes by, and that will occur early on in the next century, it's clear that the — everybody under — people in the category of the plaintiffs, over 40, the effect, essentially, is only seven years. But forget that for just a moment.

THE REPORTER: Sir, I'm going to have to ask you to slow down, please.

MR. MCKENDREE: I apologize.

Each of these affiants, each of these plaintiffs have provided an affidavit, and some more in a detailed form than others, particularly the lead plaintiffs, concerning the knowledge these parties had regarding the age, the knowledge these parties had regarding what the effect would be on the act if they entered into the agreement they entered into, and they [37] produced no evidence, no evidence to the contrary. What they have alleged is a law, all we're doing is complying with the Law. Sue George Bush and the Congress of the United States — well, I'd love to say George Bush, but not in context of this case, Your Honor.

So, furthermore, the affidavits that are attached show that rather than in the simplistic manner suggested by these

defendants with respect to the operation of the Crew Consist Agreement before the current agreement at issue, that employees somehow can sit back on their rights — kind of almost like a statute of limitation argument they make — that they kind of sit on their rights and let all the younger people pass them by, and now they're complaining about that. Not all these plaintiffs can you fit in that category.

I will direct Your Honor's attention, for example, to the lead plaintiff, Jerome Smith, in the Burlington Northern case, who took his promotion in the early 1970s to conductor and thereafter relinquished his right to that title under whatever the circumstances were, and thereafter attempted to regain it and was precluded from doing so.

There are a number of factual matters such as that which have not yet been addressed yet in this case or responded to by the defendants.

As a matter of fact, the factual matters that we have presented we respectfully believe have been demonstrated in a [38] prima facie case of disruptive treatment in respect to the administration of the defendant's obligation under the ADEA.

However, there is some references in some of the affidavits to the kind of almost direct discrimination intent that one would expect when younger people get to have an opportunity over older people and then complain because older people are now griping about it.

So there's direct statements of some local union officials referring to the plaintiffs and other brakemen as drones. There's evidence in some of the affidavits we have provided of statements

being written on the bathroom wall of a derogatory nature, that old folks are nothing more than drones. Why, there's some direct evidence for some of the plaintiffs of age discrimination; however, not all plaintiffs fit in that category. And, as a consequence, we believe the prima facie case with reference to disruptive treatment is the best one to present to Your Honor at this time.

Alternatively, it may be a mixed motive. It's difficult to know because we have come forward with evidence that addresses the age discrimination in employment issues raised by these plaintiffs, the countervailing evidence does not exist.

So, therefore, in certain respects on a traditional Rule 56 kind of decision, there is no evidence that couldn't contradict ours other than the fact — well, we had no choice, [39] we had to because Congress told us no.

If I haven't said this, Your Honor, I think it is important for me to say that the plaintiffs' position in this litigation is not snidely taken. We don't say that Public Law 102-29 can't be attacked because it's some kind of defeat on our part. It's a simple statement of fact. And we don't dispute that.

The issue in this case always has been and always will be focused on what the obligation was under the administration of the Age and Employment Discrimination Act when these parties sat down at the bargaining table to negotiate a new Crew Consist Agreement that would not discriminate against the older workers.

Thank you, Your Honor.

THE COURT: Thank you, Mr. McKendree.

Rebuttal?

MR. POWERS: Mr. Stroik will present the rebuttal.

THE COURT: All right, fine.

MR. STROIK: I have quite a number of points to make. I'll to do this as succinctly as I can.

THE COURT: Take your time and do it. We'll probably take a break at about 10:30 and give the court reporter a chance to rest his hands and go forward from there. Judge your time accordingly.

MR. STROIK: Very good, Your Honor. Well, I think [40] it's well that we have at least a couple things behind us, after having listened to counsel's argument on behalf of the plaintiffs, that it is now conceded in both the plaintiffs papers as well as in our argument here that the difficulties — the alleged difficulties that these plaintiffs find themselves in came about as a result of their personal choices not to take promotion on earlier occasions when they were offered.

What the plaintiffs really want here is Public Law 102-29 plus more. They want everything that Congress mandated. But they say, "We want this whole process to go back and have the agreements renegotiated to protect this group of plaintiffs from perhaps short-range decisions that they have made earlier for very, as Mr. Powers pointed out, personal economic decisions that may very well have made sense at the time.

They elected not to seek promotion, whereas at the same time they put employees in. In fact, in the last 25 years when

employees could retain seniority on both brakemen seniority rosters and conductors seniority rosters at the same time, employees of all types, all ages, were taking promotion. Old employees, younger employees, newly hired employees were taking promotion to conductor, thereby obtaining that newly qualified seniority on the conductor's list. These plaintiffs did not do so and in many cases time and time again did not do so .

Counsel started out with an argument that they made [41] these choices, these acknowledged choices on the promise of some protection from harm. I think it would do well to put the red herring aside right now.

First of all, directive bargaining agreements is almost elementary and fundamental to the process. No one ever gave these plaintiffs or anyone else a warranty that no conditions of this type would ever change in their careers.

And even to the extent they may have believed they did counsel would be content that Congress is unable to change those matters. That's exactly what Congress did. Congress went in and lifted the moratorium, lifted these attrition provisions and mandate that the Crew Consist issue be resolved, at the same time mandating conductor promotion. And I might add, because it hadn't come out yet or been mentioned yet, that since about the mid 1984 and '85 new hires, no new brakeman hires in the industry and on Burlington Northern since 1984 were required to take promotion when offered.

Again, without regard to age, an employee hired after 1984 was 45, 55, 65. When this promotion was offered, it had to be taken. And in the prior 20 years from 1984, these choices were made without regard to age.

THE COURT: Let's see, I'm puzzled. Before your last statement if the new brakeman hires as a result of their contract were required to take promotion. Was this a contract that affected only new hires or did it affect all brakemen?

[42] MR. STROIK: The former is the correct one, Your Honor. It affected only new hires. Part of it involving processes in the rail industry of trying for two or three decades now to reduce those crew sizes to blend skills, to unify skills, stuff that a multiplicity of employees wouldn't be necessary. So it's been a long process. This was one small step obtained in the mid-eighties to at least at that time require that new hires be required to take conductor promotion when offered.

So this whole argument is water under the congressional dam. Congress looked at these things indeed. Congress specifically looked upon the arguments of the UTU, to the Presidential Emergency Board and then, again, to the Special Board, that they ought to modify or remove this mandatory conductor profession because of the impact on senior employees, as they call it. And the specific finding was made by the district court judge in the Local 1389 decision out of the Eastern District of Kentucky, which is attached on pages 4 and 5. It's right there, a finding of facts. These arguments were specifically made to both the Presidential Emergency Board and the Special Board.

The Presidential Emergency Board nevertheless issued its recommendations for Crew Consist reductions and lifting of the moratorium and for mandatory conductor promotion. Congress accepted those.

[43] Also I wasn't sure where counsel is going in that Congress was presumed to know the other laws that it has enacted

over the years. Well, that may be a simplistic rule of the legislative process, he presumed Congress did. Did it indeed know? We're more than willing to concede that here.

THE COURT: Why don't you presume that Congress is omissioned?

MR. STROIK: That seemed to be what counsel for the plaintiff is suggesting. And that's a bit of the charitable concession, but, as I say, this issue was there, it was raised in the thousands of pages of testimony and exhibits, mountains of material presented to the Presidential Emergency Board and through to Congress.

THE COURT: I do think there is a rule of in pari materia which requires one to construe in part materia with others. The logic of that reasoning would probably apply to Congress, that in passing those acts it's aware of the other acts.

MR. STROIK: As I say, that's a presumption that I'd be willing to proceed with, sure, right, any indication to the contrary.

THE COURT: The question in my mind is if they had to be aware of the ADEA, how about the ADA, the disabilities business? Of course, it probably wouldn't apply in this way because you couldn't have a disabled worker, but I wonder what [44] other acts there might be?

MR. STROIK: I'm not aware of how the ADA itself would enter into this particular picture.

THE COURT: I don't see that. But I just wonder about how far you could carry that concept.

MR. STROIK: Well, I think that the saving grace is that Congress is presumed to be able to go back to undersights and oversights, if it wishes to, and that presumption is probably sound in at least the first instance.

But the point I simply wanted to make here, Your Honor, these contentions were made to the PEB 219 and then to Congress.

Another point I'd like to clarify here is that somehow these plaintiffs lost somebody. By this process, of course, they like to contend that — they like to say that I lost somebody because they are not able to — they're not as high up on the conductor list as they might have been had they made other choices earlier in their careers. That's what they want this Court to repair.

But the Crew Consist Agreement of 1991 and the law, that was Public Law 102-29, didn't eliminate the brakeman craft. These dual seniority systems still exist. These plaintiffs are on both of them today. There are still brakeman jobs out there, of course there are, a great many fewer, that was the point of the Crew Consist reductions. But they're [45] still there. They can still work as brakemen although on fewer occasions, and they have contended to the contrary.

I think in a lot of the argument that plaintiffs' counsel was making he was quite cleverly, I must admit, trying to turn the tables on who has to show or allege what here.

We don't even see a prima facie case here. If you want to talk about the Age Discrimination Act in particular, by the very admissions that I just talked about, these plaintiffs were not qualified as conductors, they had to become qualified and that involved a process of education and testing and final approval.

They were compelled to take that promotion or embark on that process for the first time by the Public Law and the agreement implementing that law. But they weren't qualified, so we're absent one of the factors right off the bat. We're absent the second factors out of — for that are traditionally decided and that is some credible, some at least superficially probable allegation that age was a factor in the decision. The decision that's bothering these plaintiffs is mandatory promotion without special protection, special affirmative protection, which, as my colleague already pointed out, is not required under the age act. Special, that's not what the age act is all about. There's been no allegation that this promotion provision was based on or age related.

It applied across the board. We cited cases [46] including the Bovers case to the Court in our briefs that indicate that factors which are analytically distinct from age are not enough to prove an age case. You have to show that the division was age based. And I might add that this principal was strongly confirmed in a Supreme Court decision this past — earlier this year in the Hazen Paper Company vs. Biggins. And I apologize that we have not cited that to the Court, it's 113 Supreme Court, 1701, I believe. But it was a very recent age case.

In that case the Supreme Court held that the plaintiffs proving that the defendants may have been culpable under ERISA by discharging the plaintiff just as the plaintiff was about to be vested, did not an age case make. They're analytically distinct.

To allege an age case you must allege factors, you must allege that the decision that leads to — that led to your alleged differences was itself based and age motivated. We don't see anything like that here.

And this also —

THE COURT: The question then arises, is this going to be an issue of fact? Your motions are arguing that there's no issue of fact here. And if I caught Mr. McKendree's arguments, yes, there are a lot of issues of fact, he says. One of them is the issue of whether or not the actual decision was in fact significantly age based so as to need — to require [47] the Court four requirements of the four applications of the acts.

MR. STROIK: Well, at the end of his argument counsel did, though, make some allegations about statements that had been made by fellow employees, derogatory statements, or local officials. I don't know if it was an attempt to save the situation or what. None of this had anything to do with the decision that was made to require mandatory conductor promotion.

Whether there are people out there, employees, fellow employees who are maligning these plaintiffs because they failed to — failed to take promotion and now are further down on the conductor list, yes or no, Your Honor, perhaps we accept that. At its worst, it's not related to the issue of whether the decision which created the alleged harm here was age based. That was a mandatory promotion. That was what was required by Congress in 102-29. We don't think they address the matter at all. That's why we think these so-called facts are just completely off the wall. They don't relate to whether there's a claim here. They need to show that somebody — somebody in the decision to require mandatory conductor promotion was age related. And even then, if Congress enacted it, I think it should be insulated from those. Neither one of those have been intended here.

I can't resist pointing out, Your Honor, that [48] counsel's

characterization of our arguments actually intending that these plaintiffs had on their hands, as he said, it's notable, I think, that the affidavit of the lead plaintiff here that was adduced to demonstrate this directly shows that the man took promotion at an early opportunity when he had the chance, and then for his own reasons relinquished it, voluntarily decided to remove himself from that conductor roster that he had been placed on by virtue of his promotion earlier.

THE COURT: So your deduction from that is that his is a very special situation, so that he's really not a representative of the plaintiff?

MR. STROIK: I don't know if he is or not. I'm not sure it matters. It's just — the point, though, is that the example that they use to this Court shows even in that single example the value that they placed on this promotion and their knowledge of the consequences.

They had promotions, they voluntarily relinquished it. And now they find themselves, once mandatory promotion occurs years later, they find themselves in a less desirable location on the seniority roster. It all came about by virtue of their own choice. The decision to impose mandatory conductor promotion had nothing to do with age.

And in our contention that's really all the comments I have, Your Honor, at the time, unless you have further [49] questions.

THE COURT: I think that covers it very nicely.

MR. MCKENDREE: May I make one brief comment in response?

THE COURT: I planned on giving you an opportunity for a rebuttal. And the whole — my concern is I'm over 50, I'm afraid I'll forget it all.

(Laughter.)

MR. MCKENDREE: I think the record will reflect that it was the burden of proof before the United States Magistrate urged that since this matter could be handled from an examination of the Public Law 102-29, that this would be appropriate for a stay of discovery. And the magistrate granted that stay given the procedural status of this case.

I'm very concerned over Burlington Northern now arguing that we haven't produced requisite facts of one kind or another to which counsel made reference, since one reason the plaintiffs haven't done so is that I complied with the Court's order on the stay of discovery.

THE COURT: All right.

MS. COUNCIL: Keeping in mind the earlier comments with regard to the court reporter, do you want me to start now?

THE COURT: We'll take a break at this time and rest up a little. We'll take about a five or ten-minute recess and we'll have your comments then.

[50] (Proceedings recessed 10:38 a.m.

and reconvened 11:55 a.m.)

THE COURT: Ms. Council?

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MS. COUNCIL: Your Honor, I just want to address one point that was raised by the plaintiff here in the course of the argument, and that is whether there's any question of fact as to the party's compliance with the mandates of Congress, PEB 219, which was comprised of individuals who were extremely knowledgeable. The industry is acutely aware of the difficulties encountered by the carriers with regard to overhandling, and understood the need to reduce manning on the train crews. Specifically recommended, it was the board's view that the sole recommendation be that all brakemen move to conductor, they should be required to accept such promotion.

That recommendation was expressly adopted by Congress when it passed and exacted Public Law 102-29, that was imposed on the parties. It was mandated by Congress that that was what the parties had to comply with. There can be no dispute as to that fact, Congress specifically imposed that requirement on the parties. So when we talk about whether there's an issue of fact, there is no issue of fact that was congressionally mandated, and that the parties had to comply with that mandate with regard to promotion.

And it's important to note as well, Your Honor, that Section 3G of Public Law 102-29 specifically provides that [51] there be no judicial review of any report or recommendation of a Special Board under this session. And it didn't say that there shall be judicial review as to age discrimination, it said there will be no judicial review as to any aspect of this report or any of its determinations. And one of the determinations was specifically requiring mandatory promotion for breaking into the conductor ranks.

And with that, Your Honor, we firmly believe that this Court

is without jurisdiction to review the claims made in plaintiffs' complaint.

THE COURT: So you're really making a 12(b)(1) argument here, Dismissal for lack of jurisdiction.

MS. COUNCIL: As well as the failure to state on relief that's granted. You have no jurisdiction, Your Honor.

And I think the other aspect, the other point we wish to make with regard to statements made by the plaintiff during the course of the argument as to what the parties could have done during the negotiations with regard to this mandate of mandatory promotion, we submit to you, Your Honor, that at best plaintiff was making an argument as to interpretation for application of a mandated provision of the congressional agreement.

At best he's making an argument that is squarely within the jurisdiction of the Railway Labor Acts and not of this Court. And so, again, we make the jurisdictional argument [52] that this Court has no jurisdiction over the arguments raised in plaintiffs' complaint. And for those reasons we move that the complaint be dismissed.

THE COURT: One of the points that you made in the Union Pacific brief I thought I'd like to know more about, and that is the argument that these people ratified the agreement after it was made by a vote of the union prior to the time the agreement was signed.

MS. COUNCIL: The 1991 agreement for this issue; is that correct, Your Honor?

THE COURT: On that ratification vote, was it overwhelming or was it just by the skin of their teeth or — I mean, can you assume that these plaintiffs voted that way?

MS. COUNCIL: Yes, sir, I can assume that these plaintiffs — that the majority of them voted that way because the ratification was by a substantial majority of the individuals in the crafts affected.

THE COURT: All right. Is there anything further, Ms. Council?

MS. COUNCIL: Mr. Brodar, I think, will wrap it up.

THE COURT: All right. Fine. Thank you very much.

When you were asking about the — I wasn't too clear about one thing about the ratification. Ratifications are done by crafts, all brakemen would vote and that vote would count as the vote all conducting. If any one craft fails, it's done. [53] But what I was getting at, if 99 percent of the brakemen voted to ratify it, you might presume there's a substantial number of these plaintiffs voted that way. You can probably assume that. And maybe they're acting contrarily to their vote.

MR. BRODAR: That's a good likelihood.

THE COURT: Go ahead.

MR. BRODAR: All right. There's really just two things I wanted to touch on, was that plaintiffs' counsel has stated that Public Law 102-29 does not establish an agreement. And I just direct the Court — I would like to read Section 1, paragraph 3 of

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Public Law 102-29, except as provided in sections three and four, they are not relevant here.

"Of this joint resolution of the report and recommendations of the Presidential Emergency Board No. 219 shall be binding on the parties upon the expiration of the periods described in Section 3(a) of this joint resolution, and all shall have the same effect as though arrived at by agreement of the parties under the Railway Labor Act."

In other words, whatever was in 219, that's your agreement, and whether you like it or not, you got it.

And 219 contains mandatory promotions —

THE COURT: At what point in the act is this statement?

MR. BRODAR: Section 1 paragraph 3.

THE COURT: Section 1, paragraph 3. Okay.

[54] MR. BRODAR: And 219 had in it mandatory conductor promotion. There was no choice that this had to be in the agreement.

And as Ms. Council referred to earlier, Section 3 paragraph G, the conclusion of the judicial review. "There will be no judicial review in the termination of the Special Board under this section."

In other words, we've now given you your agreement, and that's the way it's going to be and no one can change that.

I want to touch on one other point the plaintiffs' counsel brought up. If this was going to go through, then we had some duty to protect these people in some way. Again, he's starting to talk about — he's talking about duty of fair representation. If we have some duty to protect him, that's not ADEA. What he's talking about is either dovetailing, which I can't explain how it happened without us closing the doors because of the number of duty of fair representation.

No matter how you phrase it, dovetail or work redistribution or some sort of reworking over the way the work is distributed, that's a collective working agreement and that's a minor dispute. And the Court has no jurisdiction in a minor dispute. That's all I have.

THE COURT: All right. Thanks, Mr. Brodar.

Mr. McKendree?

MR. MCKENDREE: The plaintiffs have not filed a brief [55] on the duty-of-fair-representation lawsuit. They raise age discrimination. Plaintiffs, in their lawsuit, have a duty to establish age discrimination, they have the burden of proof, they have the duty to present facts in respect to age discrimination issues.

Plaintiffs are entitled, if they choose to file in the age discrimination lawsuit, to do so, and not have it mischaracterized for whatever reason. But there's a number of issues where that is an important consideration for me at least to address, Your Honor.

Number one, there's a different statute of limitations period

that's involved in a duty-of-fair-representation lawsuit than there is in an age discrimination suit. Both of these charges were filed in deferral stage where there's three hundred days within which to complain of the discrimination where, as all of the experienced counsel know under Costello and other rules, they only have 108 days within which to bring a duty-of-fair representation lawsuit.

Moreover, the UTU in its litigation with Local 1389 has prevailed on a breach of duty of fair representation issue. And I think it's worth a moment of time to consider why they prevail. They prevailed because the plaintiffs were upset. As we read that case, over the mandatory promotion requirements that the UTU didn't meet good enough — didn't do the right [56] kind of job. We concede and have from the very inception that Congress had the right to do what it did in doing away with the brakemen classification and complicating that doing away with by the establishment of the principal that there be a mandatory promotion.

We don't ask judicial review of that fact. We accept that Public Law in Sections 1 and Section 3, limit your jurisdiction on that. We're not upset about that limitation.

THE COURT: They're saying that it does more than limit it. They say that the act provides that the Court has no jurisdiction.

MR. MCKENDREE: That's correct. You would have no jurisdiction if the gravamen of this lawsuit was the age discrimination that was mandated by Congress because of the mandatory promotion language. That's not this case, never has been this case. The mandatory promotion was an obvious. Congress did not legislate that the people who were brakemen be

fired. When the brakeman position was taken away with, Congress could have, I guess, in theory, legislated they each be given $50,000, and that be it, that's the end of this case. Give them 50 grand and take them off the payroll. Congress didn't do that. Congress could have done something like what it did, you got to promote them.

So, okay. And when you did do that, you sit down at the bargaining table and you negotiate the terms and conditions [57] surrounding how you're going to compute this promise, this obligation that we impose upon you.

It is the negotiating aspects which forms the gravamen of these plaintiffs' complaint, not that which precedes it. Now there's some evidence — strike that.

There's some argument that — there is evidence that or some suggestions, I think it's in the Burlington memorandum, that somehow the UTU made some argument before PEB 219 from which this Court should conclude that Congress intended that the agreement that they negotiated when Congress told them had to be negotiated that way, in the way that it's negotiated. I don't know if that's true or not. I haven't seen any evidence on this point. There's no contraindicating affidavits to the affidavits we have presented on the factual issues dealing with the knowledge they have had of disparate impact, but the question does not necessarily require we establish motivation. So all the ways they decide about motivation and the deliberate knowledge that they had and so forth is not necessarily what this case is all about.

However, to the extent that evidence is required on any of these defenses, we would respectfully urge that at this early stage

that you adduce, and I find out and cross-examine it and do all the other things required by the evidentiary standpoints. I don't think it matters. Because a lot of arguments, I'm sure, were made before the PEB. But what [58] matters here is an interpretation of Public Law 102-29 concerning whether or not congress granted any authority to these parties to negotiate when Congress said you will negotiate a new Crew Consist Agreement. And it is that negotiating process that forms the gravamen of this case.

And this record is presently devoid of one iota of evidence countervailing that which is in the record which we have presented and is attached to our memorandum. And opposition, even though when these proceedings started it was our understanding there was going to be a rifle-shot brief, as I understand you say here in Wyoming, in the sense that these dealt — felt that legal arguments they advanced with such vigor about the impact of Public Law 102-29 and the proceedings prior to it and the Special Board proceedings would as a matter of law mean this case goes away.

That's the context in which these plaintiffs have participated in these proceedings. And it was not until there were attachments and affidavits and other matters that suggested that the matter was going to be enlarged beyond the title legal issue. Since we were under order not to conduct any discovery, that we've presented the evidence that is attached.

So —

THE COURT: What is your argument in response to

Mr. Brodar's point that these are minor labor disputes of which [59] the Court has no jurisdiction?

MR. MCKENDREE: There is not one issue set forth in either of these two complaints that puts in contest an interpretation of the language used in the agreement, the language used in the agreement forms the violations of the Age Discrimination Act.

Now, they are suggesting that when, by Mr. Brodar's suggesting, I believe he's suggesting that when there is at issue a collective bargaining agreement, the age discrimination for which there must be some recommended fee, whatever that may be, that in the context of the administration of the Railway Labor Act, it's a minor dispute.

And that plays in the face of all of the authority that indicates that the Railway Labor Act employers and unions are not exempt from the administration of the Age and Employment Discrimination Act. We don't dispute the application that the language that's in the agreement, we protest it because it violates the law.

I note, however, that the carriers' argument with reference to whether or not this is a minor dispute for which the grievance arbitration provision should apply is not expressed with the same vigor today as it was in the opening memorandum.

I don't know what significance that has as a practical matter other than I think it is time that most [60] parties to this litigation realize that what the plaintiffs are trying to do is invoke a ADEA remedy and nothing else. If these plaintiffs want to sue the union for the breaching of fair representation, they had every right to protect a claim in that.

THE COURT: But they have not.

MR. MCKENDREE: They have not.

I'd just like to comment for a moment on a matter which Mr. Brodar responded to in respect to the question, as I recall, it was prompted by Your Honor, and that deals with the ratification process in the votes. I don't believe that's relevant, Your Honor, with all due respect, it may be, but as older

THE COURT: It occurs to me how this is hot and cold. If they voted to ratify this agreement, how can they now be heard to object to it?

MR. MCKENDREE: How can there be a secret ballot election? Question number 1, we're talking about an industry or labor organization regulated by the Labor Management Disclosure Act with certain rights to privacy in the electoral process. That would be point No. 1.

Point 2, there is not one shred of evidence in the record that shows that any one of these plaintiffs who have not petitioned this Court for classification voted for ratification or against ratification. We respectfully argue, Your Honor, at [61] some point in physical time when we get to the evidence that deals with the allegations as we respectfully believe we're entitled to. That the question of how one votes is a question of how free the electoral process is. How free from pressure, how free from doubt, how honest and sincere the opportunity to cast one's ballot is in full knowledge of the implications and understanding, all of which they record is devoid of any evidence.

So to the extent that this is a matter of importance or relevance to a resolution of the ADEA claims, to that extent, the

motion must be denied because there is no evidence on the record to indicate that these plaintiffs voted for ratification, and there is certainly no ADEA requirement, nor has the Court been directed to any court decision that says that as a condition for stating a claim of age discrimination in the face of a Railway Labor Act, the plaintiffs have an obligation to plea affirmatively ratification vote issues.

Now it is important for me to note that in the arguments on behalf of the plaintiffs in opposition to the pending motions, I'm the one who wrote the word "dovetailing," and I'm the one who wrote the words "distributing the work." I'm not the one who wrote those words in the complaint.

And it is true that by virtue of stating a claim alleging discrimination the Court has the discretion and the power to enter the appropriate remedy after all the evidence is [62] in and the evidence before Your Honor now, fairly viewed in light — in my favor, since I'm the one posing the most — or the plaintiffs are, is, in a nutshell, as follows:

All of the proceedings associated with the development and the existence of PEB 102-29, none of which we dispute.

The DC circuit decision described in detail that history. That decision, as I can from my research know — I can tell from my clients none of whom to my — I haven't been able to find one who is the union officially who knows for sure all these things, we don't dispute that recitation of the history.

And it is alleged factually in the affidavits attached to one or more of the defendant's briefs. Therefore, up to the point that the

parties sat down at the bargaining table to negotiate the new Crew Consist Agreement in accordance with the mandates of Public Law 102-29, there is no factual dispute, there's none.

However, since this has been converted into a Rule 56 kind of situation with some inhibitions on our ability to do some discovery, it nevertheless is a case that every one of the affidavits attached to the plaintiffs' memorandum in opposition to the motion for summary judgment addresses the knowledge that the negotiator had when they sat at that table concerning the ramifications of age discrimination that they had a duty to [63] negotiate. They didn't have that duty, because it was a duty of fair representation mandated by the exclusivity of the UTU's representation of the brakemen. They had that duty because of the existence of the Age and Employment Discrimination Act.

Every one of the affidavits attached to the memorandum in opposition by as many of the plaintiffs who were spread out geographically as we were able to accommodate by October the 25th, some of which have come in since that date — I did not file them, I did not feel it was appropriate to do so — address how they have been discriminated against, how they have been impacted on, not because of the mandatory promotion, not because of the taking away of the brakemen's position, but because of the details negotiated in the agreement that forms the Crew Consist Agreement for 1991 and the one at issue. There are no countervailing affidavits that have been filed, unless there's one in the Union Pacific memorandum that — the reply memorandum, which I haven't had an opportunity to study. But I'm informed there's not. I can't make that personal representation, Your Honor.

Subsequently to the extent that this is a Rule 56 matter, and

giving the parties who oppose the motion the benefit of the doubt, for want of a better phrase, in terms of the evidentiary issues presented, all of the major evidentiary requirements of discrimination exist either in the complaint, which is not portions of which they do not contest, and/or in [64] the affidavits which are attached in their motion.

Therefore, their motion must be dismissed, it's premature. To the extent that any motion is considered one based solely upon the absence of subject matter jurisdiction because of the existence of the prohibition on judicial review set forth in Public Law 102-29, no such prohibition exists on the issues. These parties had a duty and a responsibility and an opportunity to negotiate within the structure of 102-29, because we don't contest it.

So there is no prohibition in this as a result, Your Honor, precluding you from administrating the Age and Employment Discrimination Act as you are afforded that opportunity by the judicial previsions thereof. And we urge you to exercise it at this stage and let's get this discovery in this case going.

The best evidence that does exist and for which there is no controversy, it has been alluded to this morning, and I apologize to Your Honor for not thinking of it sooner, there has been argument advanced this morning that if they had not reached a Crew Consist Agreement pursuant to the mandates of 102-29, there would have been an arbitration. And if there could have been such an arbitration, an arbitrator would have Imposed what the terms of the Crew Consist Agreement were, Which were not those terms already mandated by Congress. To sit, "You can't rely on the moratorium any longer, Mr. Union, [65] and Mr. Carrier. And both of you are going to have in there a mandatory promotion provision. Go bargain it."

If they haven't been successful and had an arbitration and if they had an arbitration and had an arbitrator's award, would that arbitrator have had the discretion to render that award as the arbitration did? There is a similar provision dealing with labor protective practices in the Cook case that we cited, that statute doesn't accept anybody with the possible exception of the Congress of the United States. And we've already mentioned that the issue of mandatory promotion did not mean a congressional determination. There's no evidence it met it. We've been through the legislative history, we cited what I read in the memorandum to Your Honor that says these parties when they sit down don't have to comply with other federal laws like the Age Employment Discrimination Act.

The Cook case, of course, deals with the administration of the Civil Aeronautics Act, it deals, of course, factually with the members of two airlines, one or more airlines, at least, and the dovetailing of their seniority rosters, an issue which apparently is not foreign to the administration of the Railway Labor Act, since these parties and the airline industry were, in fact, regulated by the Railway Labor Act. They had an arbitrator offer the question of whether or not the composition of the seniority entitlements [66] of the employees and the merged airline was going to be — how it was going to work, and the arbitration set it all out. And the United States Court of Appeals said it was a mistake to dismiss this case, because that arbitrator did not, in fact, address the age discrimination issues the plaintiffs raised in the complaints.

These parties did not do so either when they negotiated the 1991 Crew Consist Agreement. And that's what this lawsuit is about.

Burlington Northern's counsel has suggested that the

plaintiffs are seeking special favors, special favors entitled to special treatment. And with all due respect to my colleague, that's simply hogwash. These plaintiffs seek their rights guaranteed by federal law and have not pled they're entitled to any special right.

It's too early, I would respectfully urge, in this civil action to know what either party should be urging upon Your Honor is the appropriate remedy because we don't have all the discovery. What really happened, what really was discussed or wasn't discussed in negotiations that form the gravamen of these complaints, because those negotiations resulted in the 1991 Crew Consist Agreement at issue, are unknown to this record right now. We haven't had a chance to do any depositions or discovery about it, and they produced no evidence by way of affidavit or otherwise before, Your Honor.

[67] These plaintiffs don't seek to be rescued from the prior decisions of not to take promotion. This case deals with the 1991 Crew Consist agreement, and analyzed in light of the history of the respective participants to that agreement, the plaintiffs, the union, the employer, they had at some point in time, I respectfully urge to Your Honor, the history — the collective bargaining histories going back to the beginning of time, which meant we have had no other clients coming up with the Crew Consist Agreement resulting in the discrimination of which the plaintiffs complain of.

Aren't we entitled at some point in time to put all of the facts well in perspective? These plaintiffs don't seek review. They seek a remedy.

I don't think there should be any confusion, finally, about

what the existing rights of the brakemen are and what their rights used to be. It's hard to know from the status of the record, because what I have is not a great deal of evidence, so all I can say is my understanding, and I say so not under oath and not as a witness, and I clearly could be wrong because I haven't had a chance to do any discovery in part. But it is a case, Your Honor, that there are still apparently some brakemen jobs that have to be worked and that there is some sort of extra board or some kind of board that brakemen get on to do brakemen kind of work.

I don't know what the details of that is. But the [68] bulk of the work they perform. Most of what has to be done is the kind of work under the kind of conditions complained of, that is described in the affidavit attached in our memorandum. And there is no countervailing evidence from any of these defendants that these complaints that are described in these plaintiffs' affidavits is wrong.

Now, if there was, we'd sure have material issues of fact presented. There are arguments to suggest, however, that there may be some material issues of fact. In fact, they have for one reason or another chose to bring those facts to Your Honor's attention.

A minor dispute deals with an employee grievance over the administration of the current collective bargaining agreement.

The age discrimination lawsuit deals, we respectfully contend, Your Honor, with the administration of a different statute, wherein there is an obligation or burden on the part of the plaintiff to prove their case like any other civil litigation.

We have set forth a prima facie case. Burlington Northern in

their reply memorandum, but not in their original memorandum, commences to argue with us about this prima facie case. They present no evidence in support of those arguments to the extent that those arguments rely upon the affidavits they have already filed and then their evidence and ours are [69] immaterial.

And, therefore, it is premature for the Court to grant a motion for summary judgment. It surely is not intended by the Age and Employment Discrimination Act that when age discrimination occurs by virtue of an agreement reached in the process of collective bargaining that the descrimitee must go to his or her union and ask his or her union to process a grievance contesting the agreement that his or her union has a duty to enforce. That can be forced by the employer, if a contract is a contract, you know, and expect that he's going to be able — he or she is going to be able to, through the minor disputes resolution language of the Railway Labor Act, to resolve it. To see it's a discrimination thing of the law is clear, Your Honor. If someone has such a claim, they filed a lawsuit. And that's what we have done. We believe these motions should be denied and it's time to get on with the discovery aspects of this civil action.

THE COURT: Thank you, Mr. McKendree.

Additional arguments or rebuttal?

MR. STROIK: I don't know what your level of tolerance is. I have about five minutes.

THE COURT: I'll be glad to hear you.

MR. STROIK: One issue I will would like to put to —

THE COURT: 24 minutes of tolerance.

MR. STROIK: It will be far briefer than that, Your [70] Honor.

One issue I'd like to put to rest immediately is whether the mandatory promotion of brakeman to conductor was or was not mandated in law. And I heard, at least, I may have misunderstood, but I heard counsel say it was not. And I would simply refer Your Honor to page 67 of the recommendations of PEB 219 wherein the board specifically recommends, and I quote, that "All brakemen who are offered promotion to conductor should be required to accept such promotion." Promotion to engineers should not be mandatory. This was one of the recommendations that was put into law by Public Law 102-29 with the force of a collective bargain agreement.

Well, I think Your Honor heard a great deal of bobbing and weaving in this last argument, and I'm not sure I followed all of it, but there seemed to be a great many inconsistencies, counsel on the one hand saying they don't seek to be rescued by their own decisions. But there's no question whatsoever, had they taken the promotion at the earliest opportunity, they would be Wall off on the conductor ranks and they wouldn't be here.

Counsel says they're seeking no special right, but they want to go back and adjust the collective bargaining agreement that they contest, the 1991 agreement, they want to go back and adjust that for the benefit of this group of plaintiffs. They dispute the way that the agreements were [71] negotiated, in counsel's own words.

But yet they say this is not a claim for breach of duty of fair representation by there exclusive representative, the UTU. He says that this involves an interpretation, again, in his own words, of Public Law 102-29, which simply posed the recommendations

of PEB 219, but says this is not a minor dispute involving the interpretation or application of an agreement, and, in this case, an imposed agreement.

But the counsel has never answered Your Honor's very apt question early on as to how these plaintiffs were discriminated against on the basis of age, apart from the mandatory promotion feature enacted by Congress and apart from their voluntary choices that they made to reject promotion earlier in their careers.

We submit that we can't answer those because there is no indication of age discrimination whatsoever in any of the pleadings or anything else, and despite the fact that we keep referring to the details, it just doesn't make a prima facie case, it doesn't make a claim and it doesn't show subject matter jurisdiction.

Finally, just a word on the Cook case vs. Pan American, which is mentioned several places in the plaintiffs' brief. There is one overriding distinguishing remark with that case and this case, and in that case the entire case dealt with an integration agreement which was approved by an arbitrator [72] under the auspices of the civil aeronautics boards of the agency — federal government of that agency are subject to the review under the Administration Procedures Act, that is not what went on here.

What we have here are specific provisions that were imposed by Congress directly through the — through the congressional power upon the parties to this labor dispute after no agreement was voluntarily reached, so that Cook case indicates nothing about this. It mandates no requirement in this case.

That's all I have.

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THE COURT: Ms. Council.

MS. COUNCIL: Your Honor, just one point.

I thought I understood the plaintiff to say that he did not dispute and was not challenging the history of PL 102-29, the recommendation of the PEB 219 leading up to PL 102-29, and that would include that Public Law 102-29 mandated mandatory promotion to conductor. That's what I heard plaintiffs' counsel saying, he did not dispute that there was no factual dispute as to those things. And as Mr. Stroik just mentioned, it's in the discrimination, is these details, that's what the issue is.

But I submit to you, Your Honor, that we wouldn't be here in court today but for the mandatory promotion to conductor issue, that now plaintiffs don't want to be bound to [73] it, yet plead in their first amended complaints. All of the allegations in their first amended complaints go to the mandatory promotion to conductor issue. Paragraph 78. "Previous Crew Consist Agreements and a 1985 agreement between defendant UPRR and UTU declared that brakemen would not be adversely affected later in their employment for not taking promotion to conductor."

Paragraph 79, and I quote, "For the most part and generally on or about February 1, 1992, defendants UPRR, and UTU entered into the current Crew Consist Agreement which basically eliminated the position of brakeman and required all brakemen to accept promotion to conductor and forfeit their craft seniority as such." And specifically says for which the agreement is discriminatory in violation of the law.

It goes on in paragraph 80 about what their real concern is, that plaintiffs have received less favorable conditions in

employment than younger employees, who acquired the conductor title prior to the Crew Consist Agreement that mandated promotion to conductor.

And finally, in paragraph 81 they state plaintiffs rely on the previous agreements. And in order to preserve their seniority, plaintiffs did not take promotion to conductor.

This whole case, Your Honor, revolves around the issue of promotion to conductor, which the plaintiffs, by [74] counsel's own admission, was mandated by Congress, that all of the parties were obligated to comply with, and that there can be no factual dispute as to the fact that that mandate was not based on age. It was age neutral, it went across the craft and addressed the issue of overmanning in the trade industry, in the railroad industry.

And I would specifically direct Your Honor's attention to the Kentucky case, again, with the specific mention of the fact that UTU realized the issue before PEB 219 and before Congress with regard to the effect of the mandatory promotion requirement on the affected employees here. This issue is clearly an issue involving promotion to conductor. That issue was covered by Congress, and Congress specifically directed that there would be no judicial review of that.

And for those reasons, Your Honor, we respectfully request that the motion to dismiss would be remanded.

THE COURT: Mr. Brodar?

MR. BRODAR: I won't take too much more. I do want to raise one point that counsel raised about the plaintiffs with regard to the LMRDA. If counsel is correct in stating that he did represent labor at one point, he should be more familiar with that

act, that's a Title IV. It concerns elections for officers of a union. And that is the only provision with regard to voting in the LMRDA, ratification of agreements is controlled by the union's constitution.

[75] And I believe that the ratification various agreements were by mail ballot, which was not a secret ballot.

Following up on that, counsel for the plaintiff has said that 58 percent of the class of the nonpromoted brakemen were involved here. Of those nonpromoted brakemen, 58 percent of those are 40 and over.

As I stated earlier, each craft votes on it, so, at least to get a majority, at least some of those, if not a majority of those people in the protected class, had to vote in favor of this agreement because they were the majority of the craft.

And I just want to follow up on what counsel said with regard to — what Stroik said with regard to this is really a problem with 102-29.

Plaintiffs' counsel tries to hit that off and tries to, as I say, has sliced the salami pretty thin. You can't do that. The effects of 102-29 is mandatory promotion. There's no way you can split it. There's something they could have done, they had to accept the mandatory promotion. That'^ what Congress said.

If they had a problem with 102-29 — I would direct the Court to Section 3, paragraph F. of 102-29, it's entitled "Clarification of Determination.

"In the event —" and the reason I bring this up is counsel said this was an interpretation of 102.

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[76] "In the event of a disagreement as to the meaning of any part of the determination by the Special Board under section (d), or as to the terms of the detailed agreements or arrangements necessary to give effect thereto, any party may, by December 31, 1991, apply to the Special Board for clarification of its determination whereupon the Special Board shall reconvene and shall promptly issue a further determination with respect to the matters raised by the application for clarification."

THE COURT: Were there any such applications?

MR. BRODAR: There might have been, but none that I'm aware of with this case.

THE COURT: Okay.

MR. BRODAR: That is followed by Section 3, paragraph G. There shall be no judicial review of the board's decision.

The Congress intentionally funneled everything to the Special Board. If there was a dispute with regard to the interpretation of 102, the Special Board and no one else has authority. And the Court certainly doesn't.

That's all I have.

THE COURT: All right. Thank you. I appreciate your help here, Mr. Brodar.

I think we better end it there unless there's something really pressing, otherwise Mr. McKendree would be on his feet.

[77] I appreciate your fine arguments on this issue, and I

really do apologize to counsel for not being more up to speed on this as I would have liked to have been. Last night at 5 o'clock I had just completed ten-page bench memo on that and then was turning to the pleading. And when I started to read that, then I received the first of, I think it was five inquiries from the jury, and that took until 10 o'clock.

So the result is I didn't get it read when I really would have liked to. But I promise you that I will get it read and will read the affidavits which I had not gotten and get a decision out in due course.

So thanks very much.

(Motion proceedings concluded

11:55 a.m., November 4, 1993.)

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[78] CERTIFICATE

I, MICHAEL ALAN SMITH, Deputy Official Court Reporter for the United States District Court, for the District of Wyoming, do hereby certify that I reported by machine shorthand the proceedings contained herein on the subject trial on the dates hereinbefore set forth, and that the foregoing 77 pages constitute a full, true and correct transcript.

Dated this 4th day of October, 1994.

s/ Michael Alan Smith
MICHAEL ALAN SMITH
Deputy Official Court Reporter

EXHIBIT I — TRANSCRIPT OF MOTION PROCEEDINGS DATED FEBRUARY 17, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Civil No. 93-CV-0209-B

LEONARD K. HIATT, et al.,

Plaintiffs,

vs.

UNION PACIFIC RAILROAD COMPANY, and UNITED TRANSPORTATION UNION,

Defendants.

Civil No. 93-CV-0210-B

JEROME J. SMITH, et al.,

Plaintiffs,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY, and UNITED TRANSPORTATION UNION,

Defendants.

TRANSCRIPT OF MOTION PROCEEDINGS

Transcript of Motion Proceedings on the above-entitled case

before the Honorable Clarence A. Brimmer, Judge, held on the 17th day of February, 1994.

Court Reporter:
MR. C. FREDERICK COLE, RPR-CM
Official Court Reporter
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Appendix 1

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Appendix I

Questions and comments
By the Court — (throughout)

[4] PROCEEDINGS

(Motion proceedings commenced in the chambers of the Court 9:00 a.m., February 17, 1994.)

THE COURT: Gentlemen, this is a hearing in the Case of Hiatt vs. Union Pacific, et al.

And since we have principally four parties, and I am in the middle of a jury trial so we have very limited time, you can each have ten minutes to a side. And we will start out with the argument of the Union Pacific.

MR. ROGERS: Your Honor, if I may, I am going to defer to the Burlington Northern. I am covering today for Union Pacific counsel in Omaha who weren't able to be here, and I believe that counsel for Burlington Northern can go ahead.

THE COURT: So Union Pacific forfeits its time?

MR. ROGERS: Well, we may. If there is time left on our side I may chime in.

THE COURT: That suits me fine, because we have really only got 30 minutes, anyway, and I don't want to keep my jury waiting.

All right. Let's hear the Burlington argument.

MR. STROIK: This is Larry Stroik on the phone in Forth Worth for Burlington Northern. I will try to stay directly on Your

Appendix I

Honor's request for the point in the [5] request for supplemental briefing on the disparate impact claim, although it is a little difficult to keep it from sloshing over, but we think, as demonstrated by the briefs, we think that there is no and should be no disparate impact theory of age discrimination available, and after the Hazen case.

THE COURT: Now the question really is: Doesn't the weight of authorities now favor it?

MR. STROIK: Now favor an impact?

THE COURT: Basically we have got about three circuits that have said that disparate ADEA language includes disparate impact, and we have got a Kansas district court decision that doesn't give any reasoning, but it says that.

Tell me why those are all wrong.

MR. STROIK: Well, our reading of the case law, Your Honor, is that there has not been an appellate decision after Hazen, and in the Tenth District post-Faulkner, which said that there is available a disparate impact theory of age discrimination, and I think that's what's important.

All the cases cited in the plaintiffs' brief are, I believe, pre-Hazen cases, and Faulkner isn't even cited.

So the real question: What is the state of the law after Hazen? And the Tenth Circuit in Faulkner has [6] expressly said that the issue is open in this district, and so I think it should be viewed that way.

The Tenth Circuit is waiting for the appropriate case.

THE COURT: Which may be this one.

(Laughter.)

MR. STROIK: That's possible. So I think it is unavoidable that we are into the appropriateness of a theory of disparate impact under the Age Act.

And our position is that, especially the post-Hazen case, and due to some of the reinforcing language in the Hazen case, that the very text of the statute under the Age Discrimination Act precludes such a theory.

By in its very terms it requires that age be a determining or motivating factor in the challenge practice. And as the Supreme Court in the Hazen case said, and I am quoting from page 1706 of the West Supreme Court Reporter, "Disparate impact, thus defined, captures the essence of what Congress sought to prohibit in the Age Discrimination and Employment Act."

And then a little further down on that same page, "When the employer's decision is wholly motivated by factors other than age the problem, the inaccurate and stigmatizing stereotypes disappears." That is the problem [7] that Congress sought to remedy with the Age Act.

So we think that there isn't any room left for a disparate impact theory after Hazen, as we believe that three justices of the Supreme Court already have indicated — not decided — but have indicated that.

THE COURT: It takes two more, too, to decide it.

MR. STROIK: It does. And whether this case gets there, or another one, we will find out. But, moreover, though, we think that there are distinct differences between the Age Act itself and the Title VII cases under which the disparate impacts theory was created, really.

The Age Act, for example, expressly permits defenses based on reasonable factors other than age for an employer's practice, and there is no such defense in Title VII.

So there are differences, contrary to what some prior cases have found, and we think those cases — or those differences are going to be shown to be dispositive in connection with the Supreme Court's clarification of what the Age Act is actually aimed at prohibiting, that is, age motivated employer behavior.

And, finally, we think another factor which suggests that there is no disparate impact theory of age discrimination available, is Congress in its very recent action in the Civil Rights Act of 1991, where Congress [8] took fairly elaborate steps to codify the disparate impact theory for Title VII cases following the controversial Wards Cove case of the Supreme Court, which had in some parties' views reallocated the burdens of proof and burdens of going forward in Title VII cases.

Congress took steps to remedy that in the Civil Rights Act by expressly codifying the disparate impact theory for Title VII, and although it made a minor change in the Age Act, in that very same piece of legislation, and so none of these measures are in the Age Act. It left the Age Act completely untouched with respect to theories of recovery or any of the other factors that it amended in Title VII.

So we think that simply this confirms the view that the Age Act requires specific age, and it is in a must, or age motivation, and was never intended to permit a disparate impact theory.

I also, Your Honor, for a minute, would like to contend here and show, I believe, Your Honor, that even if we assume that there is a theory of disparate impact available under the Age Act, we believe there is nothing remotely like a prima facie case of age discrimination under a disparate impact theory here.

Under the Branson case in the Tenth Circuit, as well as the MacDonald case cited by the plaintiffs, the [9] points of prima facie case for disparate impact theory are well spelled out, and they are that you must identify the specific employment practices which are being challenged, you must show that there is a disparate impact on the basis of age.

And, finally, you must allege and eventually show that the practice has caused the exclusion of the plaintiffs because of their age. None of those criteria can possibly be met here, I think as has been demonstrated in the lengthy argument and prior papers.

First of all, on identifying the employment practices, the practices that are being challenged here are the mandatory conductor promotion provision, and the crew consist reduction, which together have led to the woes that the plaintiffs are alleging.

Both of these factors are tied directly to an act of Congress in Public Law 102-29, and indeed are tied to a long standing seniority system. And, of course, as Your Honor is aware, there is a specific exemption under the Age Act when a seniority system is involved, when the challenge practices relate to a seniority system.

So that element fails.

Secondly, on the element of showing a disparate impact on the basis of age, I would only like to observe that, at least in the Smith case, of the 52 plaintiffs, [10] five of them were not even in the age-protected bracket as of the precipitating event, the agreement of October 25, 1991. And I can certainly identify those individuals, but the point is simply to show here that this has nothing to do with this case, there is no disparate impact on the basis of age.

And, thirdly, the third element of a prima facie disparate impact case is that to at least allege that the practice, the challenging practice, has caused the exclusion of the plaintiffs because of their age.

And I think we have learned very clearly from what has gone before in this case, that the alleged exclusion of the plaintiffs here is due to their simple voluntary acts of failing to become qualified for a conductor previously, and become promoted to conductor.

Those were voluntary choices they made, as has been acknowledged many times in oral argument, and in the papers of the plaintiffs. These were voluntary choices. There has been no cause of their exclusion on the basis of age.

They took acts which led to their exclusion from the conductors' exclusion, from the conductors' seniority list. And actually, let me rephrase that. They are not excluded from the list, they are simply further down in seniority on the conductors' list because they [11] chose to become qualified and to become promoted to a conductor later rather than earlier.

THE COURT: You have 30 seconds.

MR. STROIK: Well, I have done it in my time then, Your Honor, because that's really the end of my initial remarks.

THE COURT: All right. Thank you very much, Mr. Stroik.

Let's have the argument on behalf of the United Transportation Union.

MR. BRODER: This is Kevin Broder.

I would agree that there is some circuits that have decided that disparate impact does apply in age cases. I don't know that there is circuits that have given the same amount of authority as Justice Easterbrook and Justice Rehnquist and, as a matter of fact, in the brief that the Burlington Northern has submitted.

I think the brief there deals with the issue very well, and the issues raised as to why disparate impact should not be considered under the Age Act.

Being that we have limited time, I don't wanted to retrace what Mr. Stroik has said, or bore the Court with what already has been presented in the briefs. Given that then, I will leave that at that, that I believe that it has been briefed fairly well by BN, and I think the Points [12] raised are very valid, that there are differences in the act that have decided the issue.

THE COURT: Please don't feel sorry, Mr. Broader, about your limited time. I sit on the Multi-District Panel, and I am amazed at what lawyers who have flown 3,000 miles across the country can say in the two minutes, three minutes, sometimes at

the most five, that they are allotted. They all get their arguments in. So ten minutes is really very ample.

MR. STROIK: I promised Mr. Broader he could reserve some rebuttal time.

THE COURT: Go ahead, Mr. Broader.

MR. BRODER: All right. I didn't mean to say that the time was short, I didn't want to retrace what had already been stated.

THE COURT: Sure, I understand.

MR. BRODER: Given that, I would just like to go on and mention or take up a point raised by Mr. Stroik, that even if you do find that there is disparate impact, that in an age case, that as far as the UTU is concerned, I don't see how that can be applied to us because there is nothing we have done, there is no practice or procedure that we have put into effect that we are responsible for that has affected anyone, or that we are responsible for. And if you are going to find disparate impact it has to be [13] something that the party was responsible for.

And as we briefed before, and we have gone over ad naseum at this point, that is, this was put in by the Congress, and the UTU, they fought it the whole way. We went "to the mat" and struck over it, and went back to work. And Congress did this, and we have to live with it. There was nothing else that we could have done.

I know that the plaintiffs kind of makes some sort of argument that we should have made some sort of accommodation, but reasonable accommodation isn't available

under the Age Act. That's something under the ADEA, or the Rehab Act, which aren't at issue here.

Given that, if I do have any time, we might like to save that for rebuttal, if that's possible, Your Honor.

THE COURT: You have six minutes left.

MR. BRODER: All right.

THE COURT: Let's hear the plaintiffs' side of it.

MR. McKENDREE: Good morning, Your Honor. John McKendree, Your Honor, on behalf of the plaintiffs.

Let me just say I will spend no more than about 15 seconds on the issue as to whether or not disparate impact should apply factually in this situation by merely commenting that we argued that at length in December, or whenever we were last here, I can't remember now the date.

[14] Our position remains the same.

And we believe 102-29 does not preclude, for the reasons we have previously assigned, our right to advance the discrimination issues presented during the disparate impact portion of the argument.

I am amazed over the foreseeability of what a decision of the U.S. Supreme Court would be on a set of facts that were not presented, in what I affectionately refer to as Biggins, and everybody else calls Hazen, and I apologize for that, by justices commenting and concurring opinion on a case that doesn't raise any of the issues that the plaintiffs in this case raise.

I am not prepared to write off the opinion of any justice of the U.S. Supreme Court and the law on any issue that is properly developed on a complete record before the Court, so the Court can make a decision based upon the facts and other elements presented. I think that's important to say because the plaintiff used the question of whether or not the Biggins case disposes of this case in a false light.

I don't see how that decision can be made until we have some facts that are developed, and we have an opportunity to do some discovery. The normal progress of a case such as this is always, in my professional experience, in part a result of the development of [15] discovery on the alleged justification defense, business defense, for example, that the employer cites.

And at that point in time the statistical evidence, which is referred to in both of the EEOC determination and the NEB determination, which is attached as an exhibit to our principal brief, together with any expert testimony, and the language over who is and what is not the proper sample to be developed here, is going to undoubtedly cause the development of a record of evidence over both disparate treatment and disparate impact.

THE COURT: So you are saying that with additional discovery you could develop a statistical approach that would justify the Court's ultimate decision here, but that you need time to make that discovery?

MR. McKENDREE: Well, there has been no discovery in this case because we have been working under a stay.

THE COURT: Right.

MR. McKENDREE: So the status of the record on this case is on the statistical evidence, is essentially the unrebutted statistical evidence that the plaintiffs have presented as an attachment to their principal brief, 68 percent in the case of one of the railroads, and I forget which one — it is 65 and 58.

THE COURT: So I hear Justice Brandice pleading for the statistical facts, huh?

[16] (Laughter.)

MR. McKENDREE: Finally, let me just say that in trying to prejudge what the Supreme Court would go for, the Tenth Circuit for that matter, on a set of facts that we don't have before us —

THE COURT: Oh, we all know there is no way of prejudging what the Tenth will do.

(Laughter.)

MR. McKENDREE: Well, I must apologize to the Court, it is the case that I read before, the Faulkner case, and I thought it was a disparate treatment case. I read it sloppily, and it is my fault, but I notice that they had a trial, there they had a developed record, and there the normal processes of the Rules of Civil Procedure came into play, and then they came out with a decision.

On the issue you asked us to brief, the Tenth Circuit has made statements, and I don't know whether they are glittering generalities, I don't know if they are platitudes, I don't know if they are sloppy judging, I don't think so, but what the Court has said, without reference to whether or not the given set of facts apply to this case, because I haven't seen a set of facts like this case, with a possible exception of the similarities that we argued

before between this case and the Cook case dealing with the CPA, the Court, the Tenth Circuit, has said on [17] many occasions that disparate impact is one of the procedures available to a plaintiff to prove the case.

I don't view the 1991 amendments to the Civil Rights Act as changing that in any way. What Congress addressed was the decision in Wards Cove, which Congress was upset about, and the decision in Wards Cove was a Title VII case, not an ADEA case.

But certainly there are several circuits, and there are several decisions that predate the 1991 Civil Rights Act in several circuits, including the cases that we have cited in the Tenth Circuit where this comment has been made, and if Congress was disposed to make sure that disparate impact was not going to be available they could have slipped it into the 1991 Civil Rights Act.

So I don't really make the argument with a great deal of vigor, because this act —

(Laughter.)

MR. McKENDREE: — was addressing, with all due respect to my colleagues on the other side, was addressing Title VII, and it preserved disparate impact, and it preserved disparate impact in whatever basis that some court is going to find it based upon the facts.

Finally, we have cited a number of cases that we think show the analysis that we believe the Tenth Circuit has always had in mind when it said that when it comes [18] to the substantive provisions, that is the prohibited discrimination provisions of Title VII, they were adopted in wholesale into the ADEA, and if

they meant what they said then that includes the disparate impact theory of proof. I don't know how much time I have left, but I would just like to say in closing that —

THE COURT: You have got four minutes left.

MR. McKENDREE: Oh, my gosh! Well, somebody else is going to get a longer rebuttal argument, because I have pretty much made the principal arguments I wanted to make, other than to say —

THE COURT: See, I knew you could do it in less than ten.

(Laughter.)

THE COURT: All right. Thanks, Mr. McKendree. I appreciate your arguments.

Mr. Rogers, would you like rebuttal?

MR. ROGERS: If I may, Your Honor.

There is one element that I think the Union Pacific stressed in its brief that really hasn't been mentioned today, and that is from the very beginning the disparate impact theory has had a built-in defense, and that's business necessity. That was an essential element of that theory when it was enunciated in the Griggs Court. And we feel that a congressional mandate, a clear [19] congressional mandate qualifies as a business necessity, and it is a complete defense.

And I think there has been ample evidence in the record presented to the Court so far of the existence of that congressional

mandate and impact that it has on the operations of both of the defendants in this case.

The plaintiffs in their brief went to great pains to try to establish that you couldn't dispose of that at the summary judgment phase. I would suggest to the Court that that's not necessarily true, and there are two cases particularly that are cited in the Union Pacific briefs, Finnegan and Fisher, in which essentially that happened.

Finnegan was really a prima facie case, but Judge Posner stated that, you know, he could dispose of it either at summary judgment or he could dispose of it by just dismissing it, because there was no prima facie case made. And he chose the former rather than the latter, but both of those alternatives were available to him.

There is some interesting language in that opinion that I could quote to the Court. Judge Posner said, "A company that for legitimate reasons decides to cut wages across the board, or to cut out dental insurance, or to curtail the use of company cars," or you could add, "or complies with an act of Congress," "is not required to conduct a study to determine the impact of the measure on [20] employees group by age."

He also stated, "There is something wrong with an interpretation of the Age Discrimination and Employment Act that provide individuals in a bankrupt corporation," this was Continental Airlines, Your Honor, "to adopt a company-wide policy of limited paid vacations."

You could also say, "There is something wrong with an interpretation that forbids a solvent company from challenging with the clear cut congressional mandate."

So we feel pretty strongly that the Court should, even arguendo, assuming that there is a disparate impact theory that applies in this jurisdiction, take the next step and look at all elements of that theory, including the business necessity defense, and dismiss the plaintiffs' complaint based upon the existence of that defense, and the fact that it has not really been refuted in the record at this point.

THE COURT: Thank you, Mr. Rogers.

Mr. Stroik?

MR. STROIK: Yes, Your Honor. A couple of comments in rebuttal, as long as we have a few minutes left.

Clearly, as long as the plaintiffs' complaint here is cast in terms of the Age Act, although we don't think that's really what's going on here, obviously the [21] questions about a possible prima facie cases under the disparate impact theory, or a disparate treatment theory arise, and so I guess we can understand Your Honor's desire to be as fully briefed as possible on these.

But we continue to be a little alarmed that one of the key factors of this entire matter somehow keeps being pushed to the side, and we think it should be right up front, and that is the fact that this all stems from an act of Congress. The conditions about which the plaintiffs complain all stem from Public Law 102-29.

And I think Your Honor asked the plaintiffs' counsel at our first argument late last year, I believe the question was put something like this: "What are the plaintiffs alleging? What harm are the plaintiffs alleging apart from those aspects mandated, those features mandated by Congress in Public Law 102-29?"

And I don't believe we ever got an answer, much less a satisfactory answer.

So I keep bringing back that all of this stems from that act of Congress, and I think really that should be the first consideration before we even get into the traditional look under the age type analysis.

THE COURT: All right. Thank you, Mr. Stroik.

Mr. Broder?

MR. BRODER: I will be very brief.

[22] Basically, I agree with what counsel for UP and BN have stated already, and I just wanted to take issue with one thing that the plaintiffs' counsel said with regard to engaging in discovery.

Engaging in discovery is really the secondary issue. The first issue that we have to decide is whether there is disparate impact. If there is disparate impact then maybe discovery would be appropriate, but until that is decided I don't think that there should be any discovery.

THE COURT: Okay. Well, Mr. McKendree is delving into his papers, and I'm sure he has got rebuttal now.

MR. McKENDREE: I was looking for the pages in my memorandum brief that responded to his inquiry. I believe they started at about page 14, and go to the end of the brief, but in any event, I addressed it in the oral argument.

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The issue is not 102-29, it is in the allegation that Congress engaged in violations of the ADEA, but deals with the conduct of the parties in compliance with it at the bargaining table.

THE COURT: All right. Thank you, gentlemen. I appreciate your arguments. I think they have been most helpful, and I thought your briefs on this point were very interesting, and that this exercise has been worth while.

[23] I still have got some studying to do, and I have got to get my coin out and start flipping.

(Laughter.)

THE COURT: So we'll get an opinion out before long. I hope it will be a little — I won't have as little brevity as the Kansas judge did, whichever way he goes.

Thank you very much.

(Motion proceedings adjourned

9:35 a.m., February 17, 1994.)

Appendix I

CERTIFICATE

I, C. FREDERICK COLE, Official Court Reporter for the United States District Court for the District of Wyoming, do hereby certify that I reported by stenographic machine shorthand the proceedings contained herein on the subject matter on the date hereinbefore set forth, and that the foregoing 23 pages constitute a full, true and correct transcript of said proceedings.

Dated this 4th day of October, 1994.

s/ C. Frederick Cole, RPR
C. FREDERICK COLE, RPR
Official Court Reporter

APPENDIX J — RELEVANT STATUTES

29 U.S.C. § 621

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

(Pub. L. 90-202, § 2, Dec. 15, 1967, 81 Stat. 602)

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29 U.S.C. § 623

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization—

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(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices: participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or

employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any

individual specified by section 631(a) of this title because of the age of such individual; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Entitlement to coverage under group health plan

(1) For purposes of this section, any employer must provide that any employee aged 65 or older, and any employee's spouse aged 65 or older, shall be entitled to coverage under any group health plan offered to such employees under the same conditions as any employee, and the spouse of such employee, under age 65.

(2) For purposes of paragraph (1), the term "group health plan" has the meaning given to such term in section 162(i)(2) of title 26.

(h) Practices of foreign corporations controlled by American employers; foreign employers not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the—

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control, of the employer and the corporation.

(i)[1] Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits—

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to

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1. So in original. There are two subsecs, designated "(1)".

the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan—

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title and section 401(a)(14)(C) of title 26 and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 411(a)(3)(B) of title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

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The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals.

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of title 26 and subparagraphs (C) and (D) of section 411(b)(2) of title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2).

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(8)(B) of title 26.

(9) For purposes of this subsection—

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of title 26.

(i)[1] Employment as firefighter or law enforcement officer

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an inter-state agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken—

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

(Pub.L. 90-202, § 4, Dec. 15, 1967, 81 Stat. 603; Pub. L. 95-256, § 2(a), Apr. 6, 1978, 92 Stat. 189; Pub. L. 97-248, title I, § 116(a), Sept. 3, 1982, 96 Stat. 353; Pub. L. 98-369, div. B, title III, § 2301(b), July

18, 1984, 98 Stat. 1063; Pub. L. 98-459, title VIII, § 802(b), Oct. 9, 1984. 98 Stat. 1792; Pub. L. 99-272, title IX, § 9201(b)(1), (3), Apr. 7, 1986, 100 Stat. 171; Pub. L. 99-509, title IX, § 9201, Oct. 21, 1986, 100 Stat. 1973; Pub. L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub. L. 99-592, §§ 2(a), (b), 3(a), Oct. 31, 1986, 100 Stat. 3342.)

29 U.S.C. § 623 (Supplement)

§ 623. Prohibition of age discrimination

[*See main edition for text of (a) to (e)*]

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

[*See main edition for text of (1)*]

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section—

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan—

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan, or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

[*See main edition for text of (3)*]

(g) Repealed, Pub. L. 101-239, title VI, § 6202(b)(3)(C)(i). Dec. 19, 1989, 103 Stat. 2233

[*See main edition for text of (h)*]

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(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits—

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee' account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan—

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan

year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title and section 401(a)(14)(C) of title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 411(a)(3)(B) of title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(a) of title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals.

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of title 26 and subparagraphs (C) and (D)[1] of section 411(b)(2) of title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2).

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(8)(B) of title 26.

(9) For purposes of this subsection—

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

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1. See References in Text note below.

(B) The term "compensation" has the meaning provided by section 414(s) of title 26.

29 U.S.C. § 628

§ 628. Rules and regulations; exemptions

In accordance with the provisions of subchapter II of chapter 5 of title 5, the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.

(Pub. L. 90-202, § 9, Dec. 15, 1967, 81 Stat. 605; 1978 Reorg. Plan No. 1, § 2, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781.)

29 U.S.C. § 630

§ 630. Definitions

For the purposes of this chapter—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trust, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent

of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

* * *

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as

amended [29 U.S.C. 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C. 151 et seq.]; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal

powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 et seq.].

* * *

29 U.S.C. § 633

§ 633. Federal-State relationship

(a) Federal action superseding State action

Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

(b) Limitation of Federal action upon commencement of State proceedings

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated; *Provided*, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

(Pub. L. 90-202, § 14, Dec. 15, 1967, 81 Stat. 607.)

42 U.S.C. 2000e

§ 2000e. Definitions

For the purposes of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivision, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

* * *

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor

organization composed of other labor organizations or their representatives. If the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C. 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C. 151 et seq.];

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employer within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

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(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [19 U.S.C. 401 et seq.], and further includes any governmental industry, business, or activity.

* * *

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42 U.S.C. § 2000e

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

* * *

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of

the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

* * *

[supplement]

§ 2000e-2. Unlawful employment practices

[See main edition for text of (a) to (j)]

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can

demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C. 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

* * *

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29 U.S.C. § 206

29 U.S.C. § 206. Minimum wage

(a) Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) not less than $2.65 an hour during the year beginning January 1, 1978, not less than $2.90 an hour during the year beginning January 1, 1979, not less than $3.10 an hour during the year beginning January 1, 1980, and not less than $3.35 an hour after December 31, 1980, except as otherwise provided in this section;

(2) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or

appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers;

(3) if such employee is employed in American Samoa, in lieu of the rate or rates provided by this subsection or subsection (b) of this section, not less than the applicable rate established by the Secretary of Labor in accordance with recommendations of a special industry committee or committees which he shall appoint in the same manner and pursuant to the same provisions as are applicable to the special industry committees provided for Puerto Rico and the Virgin Islands by this chapter as amended from time to time. Each such committee shall have the same powers and duties and shall apply the same standards with respect to the application of the provisions of this chapter to employees employed in American Samoa as pertain to special industry committees established under section 205 of this title with respect to employees employed in Puerto Rico or the Virgin Islands. The minimum wage rate thus established shall not exceed the rate proscribed in paragraph (1) of this subsection;

(4) If such employee is employed as a seaman on an American vessel, not less than the rate which will provide to the employee, for the period covered by the wage payment, wages equal to compensation at the hourly rate prescribed by paragraph (1) of this subsection for all hours during such period when he was actually on duty (including periods aboard ship when the employee was on watch or was, at the direction of a superior officer, performing work or standing by, but not including off-duty periods which are provided pursuant to the employment agreement); or

(5) if such employee is employed in agriculture, not less than the minimum wage rate in effect under paragraph (1) after December 31, 1977.

(b) Additional applicability to employees pursuant to subsequent amendatory provisions

Every employer shall pay to each of his employees (other than an employee to whom subsection (a)(5) of this section applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966; title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], or the Fair Labor Standards Amendments of 1974, wages at the following rate: Effective after December 31, 1977, not less than the minimum wage rate in effect under subsection (a)(1) of this section.

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(c) Wage rates superseded by recommendation of special industry committee

(1) The rate or rates provided by subsection (a)(1) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands only for so long as and insofar as such employee is covered by a wage order (A) heretofore or hereafter issued by the Secretary pursuant to the recommendations of a special industry committee appointed pursuant to section 205 of this title, and (B) which prescribes a wage order rate which is less than the wage rate in effect under subsection (a)(1) of this section.

(2)(A) Each wage order rate under a wage order described in paragraph (1) which on December 31, 1977, is at least $2 an hour shall, except as provided in paragraph (3), be increased —

(i) effective January 1, 1978, by $0.25 an hour or by such greater amount as may be recommended by a special industry committee under section 208 of this title, and

(ii) effective January 1, 1979, and January 1 of each succeeding year, by $0.30 an hour or by such greater amount as may be so recommended by such a special industry committee.

(B) Each wage order rate under a wage order described in paragraph (1) which on December 31, 1977, is less than $2 an hour shall, except as provided in paragraph (3), be increased —

(i) effective January 1, 1978, by $0.20 an hour or by such greater amount as may be recommended by a special industry committee under section 208 of this title, and

(ii) effective January 1, 1979, and January 1 of each succeeding year—

(I) until such wage order rate is not less than $2.30 an hour, by $0.25 an hour or by such greater amount as may be so recommended by a special industry committee, and

(II) if such wage order rate is not less than $2.30 an hour, by $0.30 an hour or by such greater amount as may be so recommended by a special industry committee.

(C) In the case of any employee in agriculture who is covered by a wage order issued by the Secretary pursuant to the recommendations of a special industry committee appointed pursuant to section 205 of this title, to whom the rate or rates prescribed by subsection (a)(5) of this section would otherwise apply, and whose hourly wage is increased above the wage rate prescribed by such wage order by a subsidy (or income supplement) paid, in whole or in part, by the government of Puerto Rico, the applicable increases prescribed by subparagraph (A) or (B) shall be applied to the sum of the wage rate in effect under such wage order and the amount by which the employee's hourly wage is increased by the subsidy (or income supplement) above the wage rate in effect under such wage order.

(3) If the wage rate of an employee is to be increased under this subsection to a wage rate which equals or is greater than the wage rate under subsection (a)(1) of this section which, but for paragraph (1) of this subsection, would be applicable to such employee, this subsection shall be inapplicable to such employee and the applicable rate under subsection (a)(1) of this section shall apply to such employee.

(4) Each minimum wage rate prescribed by or under paragraph (2) shall be in effect unless such minimum wage rate has been superseded by a wage order (issued by the Secretary pursuant to the recommendation of a special industry committee convened under section 208 of this title) fixing a higher minimum wage rate.

(d) Prohibition of sex discrimination

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rage of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any

amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(e) Employees of employers providing contract services to United States

(1) Notwithstanding the provisions of section 213 of this title (except subsections (a)(1) and (f) thereof), every employer providing any contract services (other than linen supply services) under a contract with the United States or any subcontract thereunder shall pay to each of his employees whose rate of pay is not governed by the Service Contract Act of 1965 (41 U.S.C. 351-357) or to whom subsection (a)(1) of this section is not applicable, wages at rates not less than the rates provided for in subsection (b) of this section.

(2) Notwithstanding the provisions of section 213 of this title (except subsections (a)(1) and (f) thereof) and the provisions of the Service Contract Act of 1965 [41 U.S.C. 351 et seq.] every employer in an establishment providing linen supply services to the United States under a contract with the United States or any subcontract thereunder shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (b) of this section, except that if more than 50 per

centum of the gross annual dollar volume of sales made or business done by such establishment is derived from providing such linen supply-services under any such contracts or subcontracts, such employer shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (a)(1) of this section.

(f) Employees in domestic service

Any employee —

(1) who in any workweek is employed in domestic service in a household shall be paid wages at a rate not less than the wage rate in effect under subsection (b) of this section unless such employee's compensation for such service would not because of section 209(g) of the Social Security Act [42 U.S.C. 409(g)] constitute wages for the purposes of title II of such Act [42 U.S.C. 401 et seq.], or

(2) who in any workweek —

(A) is employed in domestic service in one or more households, and

(B) is so employed for more than 8 hours in the aggregate,

shall be paid wages for such employment in such workweek at a rate not less than the wage rate in effect under subsection (b) of this section

* * *

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29 U.S.C. § 206 (Supplement)

29 U.S.C. § 206. Minimum wage

(a) Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) except as otherwise provided in this section, not less than $3.35 an hour during the period ending March 31, 1990, not less than $3.80 an hour during the year beginning April 1, 1990, and not less than $4.25 an hour after March 31, 1991;

[*See main edition for text of (2)*]

(3) if such employee is employed in American Samoa, in lieu of the rate or rates provided by this subsection or subsection (b) of this section, not less than the applicable rate established by the Secretary of Labor in accordance with recommendations of a special industry committee or committees which he shall appoint pursuant to sections 205 and 208 of this title. The minimum wage rate thus established shall not exceed the rate prescribed in paragraph (1) of this subsection;

[*See main edition for text of (4) and (5); (b)*]

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(c) Employees in Puerto Rico

(1) The rate or rates provided by subsection (a)(1) of this section shall be applicable in the case of any employee in Puerto Rico who is employed by —

(A) the United States.

(B) an establishment that is a hotel, motel or restaurant,

(C) any other retail or service establishment that employs such employee primarily in connection with the preparation or offering of food beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs, or

(D) any other industry in which the average hourly wage is greater than or equal to $4.65 an hour.

(2) In the case of any employee in Puerto Rico who is employed in an industry in which the average hourly wage is not less than $4.00 but not more than $4.64, the minimum wage rate applicable to such employee shall be increased on April 1, 1990, and each April 1 thereafter through April 1, 1994, by equal amounts (rounded to the nearest 5 cents) so that the highest minimum wage rate prescribed in subsection (a)(1) of this section shall apply on April 1, 1994.

(3) In the case of an employee in Puerto Rico who is employed in an industry in which the average hourly wage is less than $4.00, except as provided in paragraph (4), the minimum

wage rate applicable to such employee shall be increased on April 1, 1990, and each April 1 thereafter through April 1, 1995, by equal amounts (rounded to the nearest 5 cents) so that the highest minimum wage rate prescribed in subsection (a)(1) of this section shall apply on April 1, 1995.

(4) In the case of any employee of the Commonwealth of Puerto Rico, or a municipality or other governmental entity of the Commonwealth, in which the average hourly wage is less than $4.00 an hour and who was brought under the coverage of this section pursuant to an amendment made by the Fair Labor Standards Amendments of 1985 (Public Law 99-150), the minimum wage rate applicable to such employee shall be increased on April 1, 1990, and each April 1 thereafter through April 1, 1996, by equal amounts (rounded to the nearest 5 cents) so that the highest minimum wage rate prescribed in subsection (a)(1) of this section shall apply on April 1, 1996.

[*See main edition for text of (d) and (e)*]

(f) Employees in domestic service

Any employee —

(1) who in any workweek is employed in domestic service in a household shall be paid wages at a rate not less than the wage rate in effect under subsection (b) of this section unless such employee's compensation for such service would not because of section 209(a)(6) of the Social Security Act [42 U.S.C. 409(a)(6)] constitute wages for the purposes of title II of such Act [42 U.S.C. 401 et seq.], or

[*See main edition for text of (2)*]

shall be paid wages for such employment in such workweek at a rate not less than the wage rate in effect under subsection (b) of this section.

* * *

29 C.F.R. § 1625.8

29 C.F.R. § 1625.8 Bona fide seniority systems.

Section 4(f)(2) of the Act provides that

* * * It shall not be unlawful for an employer, employment agency, or labor organization * * * to observe the terms of a bona fide seniority system * * * which is not a subterfuge to evade the purposes of this Act except that no such seniority system * * * shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual. * * *

(a) Though a seniority system may be qualified by such factors as merit, capacity, or ability, any bona fide seniority system must be based on length of service as the primary criterion for the equitable allocation of available employment opportunities and prerogatives among younger and older workers.

(b) Adoption of a purported seniority system which gives those with longer service lesser rights, and results in discharge or less favored treatment to those within the protection of the Act, may, depending upon the circumstances, be a "subterfuge to evade the purposes" of the Act.

(c) Unless the essential terms and conditions of an alleged seniority system have been communicated to the affected employees and can be shown to be applied uniformly to all of those affected, regardless of age, it will not be considered a bona fide seniority system within the meaning of the Act.

(d) It should be noted that seniority systems which segregate, classify, or otherwise discriminate against individuals on the basis of race, color, religion, sex, or national origin, are prohibited under title VII of the Civil Rights Act of 1964, where that Act otherwise applies. The "bona fides" of such a system will be closely scrutinized to ensure that such a system is, in fact, bona fide under the ADEA.

[53 FR 15673, May 3, 1938]

Appendix J

PUBLIC LAW 102-29

Public Law 102-29
102d Congress

Joint Resolution

To provide for a settlement of the railroad labor-management disputes between certain railroads represented by the National Carriers' Conference Committee of the National Railway Labor Conference and certain of their employees.

Whereas the labor disputes between certain railroads represented by the National Carriers' Conference Committee of the National Railway Labor Conference and certain of their employees represented by certain labor organizations threaten essential transportation services of the United States;

Whereas it is essential to the national interest, including the national health and defense, that essential transportation services be maintained;

Whereas the President, pursuant to the provisions of section 10 of the Railway Labor Act (45 U.S.C. 160), by Executive Order No. 12714 of May 3, 1990, created Presidential Emergency Board No. 219 to investigate the disputes and report findings;

Whereas the recommendations of Presidential Emergency Board No. 219 issued on January 15, 1991, have formed the basis for tentative agreements between some, but not all, of the parties to the disputes;

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Whereas the recommendations of Presidential Emergency Board No. 219 issued on January 15, 1991, have not resulted in a settlement of all the disputes;

Whereas all the procedures provided under the Railway Labor Act, and further procedures agreed to by the parties, have been exhausted and have not resulted in settlement of all the disputes;

Whereas it is desirable to resolve such disputes in a manner which encourages solutions reached through collective bargaining;

Whereas Congress, under the Commerce Clause of the Constitution, has the authority and responsibility to ensure the uninterrupted operation of essential transportation services;

Whereas the Congress finds that emergency measures are essential to national security and continuity of transportation services by such railroads; and

Whereas Congress has in the past enacted legislation for such purposes; Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. CONDITIONS DURING RESOLUTION OF DISPUTES.

The following conditions shall apply to the disputes referred to in Executive Order No. 12714 of May 3, 1990, between certain railroads represented by the National

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Carriers' Conference Committee of the National Railway Labor Conference and the employees of such railroads represented by the labor organizations which are party to such disputes:

(1) The parties to such disputes shall take all necessary steps to restore or preserve the conditions out of which such disputes arose as such conditions existed before 12:01 a.m. on April 17, 1991, except as otherwise provided in this joint resolution.

(2) The final paragraph of section 10 of the Railway Labor Act (45 U.S.C. 160) shall apply and be extended for an additional period with respect to the disputes referred to in Executive Order No. 12714 of May 3, 1990, so that no change shall be made before the expiration of the period described in section 3(e) of this joint resolution by such parties, in the conditions out of which such dispute arose as such conditions existed before 12:01 a.m. on April 17, 1991.

(3) Except as provided in sections 3 and 4 of this joint resolution, the report and recommendations of Presidential Emergency Board No. 219 shall be binding on the parties upon the expiration of the period described in section 8(e) of this joint resolution, and shall have the same effect as though arrived at by agreement of the parties under the Railway Labor Act (45 U.S.C. 151 et seq.).

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SEC. 2. APPOINTMENT OF SPECIAL BOARD.

The President shall promptly appoint a 3-member Special Board. One member of the Special Board shall be an individual who was a member of Presidential Emergency Board No. 219. The remaining 2 members shall be appointed by the President from a list of arbitrators compiled by the National Mediation Board. No member appointed to such Special Board shall be pecuniarily or otherwise interested in any organization of employees or any railroad. The compensation of the members of the Special Board shall be fixed by the National Mediation Board. The second paragraph of section 10 of the Railway Labor Act shall apply to the expenses of the Special Board appointed under this subsection as if such Special Board were a board created under such section 10.

SEC. 3. RESOLUTION OF ISSUES IN DISAGREEMENT.

(a) REQUESTS FOR CLARIFICATION OR INTERPRETATION OF AMBIGUITIES. — Within 5 days after the Special Board is appointed under section 2, any party to the disputes referred to in Executive Order No. 12714 of May 8, 1990, may request the Special Board to clarify or interpret any ambiguities in the recommendations of Presidential Emergency Board No. 219.

(b) CLARIFICATION AND INTERPRETATION REPORT. — Within 15 days after the Special Board is appointed under section 2, the Special Board shall issue a report addressing requests made under subsection (a).

(c) REQUESTS FOR MODIFICATION. — Within 10

days after the Special Board issues its report under subsection (b), any party to the disputes referred to in Executive Order No. 12714 of May 3, 1990, may request the Special Board to modify any specific recommendation of Presidential Emergency Board No. 219 with respect to any issue on which the parties remain in disagreement. Issues on which Presidential Emergency Board No. 219 made no specific recommendation shall not be subject to consideration by the Special Board.

(d) PROCEDURE AND DETERMINATION. — The Special Board shall conduct such proceedings as it considers necessary to review requests made under subsection (c). In making a determination under this subsection, the Special Board shall accord a presumption of validity to the recommendations of Presidential Emergency Board No. 219. The party requesting a modification of a particular Presidential Emergency Board recommendation shall bear the burden of persuasion with respect to the modification of such recommendation. In order to overcome such presumption of validity, the party requesting a modification must show that the Presidential Emergency Board recommendation is demonstrably inequitable or was based on a material error or material misunderstanding. No later than 30 days after the 10-day period described in subsection (c), the Special Board shall complete its review and issue a final determination on all requests made under subsection (c), modifying in whole or in part the recommendation of Presidential Emergency Board No. 219 as to which the request was made, or denying such request.

(e) EFFECT OF DETERMINATION. — Upon the expiration of 10 days after the issuance of the determination of

the Special Board under subsection (d), such determination shall be binding on the parties and shall have the same effect as though arrived at by agreement of the parties under the Railway Labor Act (45 U.S.C. 151 et seq.).

(f) CLARIFICATION OF DETERMINATION. — In the event of disagreement as to the meaning of any part or all of the determination by the Special Board under subsection (d), or as to the terms of the detailed agreements or arrangements necessary to give effect thereto, any party may, by December 31, 1991, apply to the Special Board for clarification of its determination, whereupon the Special Board shall reconvene and shall promptly issue a further determination with respect to the matters raised by any application for clarification. Such further determination may, in the discretion of the Special Board, be made with or without a further hearing.

(g) PRECLUSION OF JUDICIAL REVIEW. — There shall be no judicial review of any report or determination of the Special Board under this section.

SEC. 4. MUTUAL AGREEMENTS PRESERVED.

Nothing in this joint resolution shall prevent a mutual written agreement to any terms and conditions different from those established by this joint resolution.

Approved April 18, 1991.

APPENDIX K — EXCERPTS OF REPORT TO THE PRESIDENT DATED MAY 3, 1990

REPORT

TO

THE

PRESIDENT

BY

EMERGENCY BOARD

NO. 219

Submitted Pursuant to Executive Order No. 12714,
Dated May 3, 1990,
and Section 10 of
The Railway Labor Act, as Amended

Investigation of disputes between the railroads represented by the National Carriers' Conference Committee of the National Railway Labor Conference and their employees represented by certain labor organizations.

(National Mediation Board Case Nos. A-11471, A-11472, A-11536, A-11538, A-11539, A-11540, A-11543, A-11545, A-11546, A-11547, A-11569, A-12117, A-12215, A-12217, A-12243, A-12252, A-12256, A-12254, A-12265, A-12266, A-12282, and A-12299)

Appendix K

Washington, D.C.

January 15, 1991

* * *

themselves to request the prompt appointment by the NMB of an arbitrator when agreement cannot be reached.

F. Specific UTU Issues

1. Crew Consist

A central issue to the railroads is the level of manning of trains, referred to as crew consist. Historically, a crew consisted of an engineer, fireman, conductor and two or three brakemen. Over the years the parties have entered into agreements to eliminate the job of fireman and many carriers have entered into agreements to eliminate the second brakeman's position by attrition. However, from the Carriers' point of view, attrition has been too slow a method of obtaining manning efficiencies.

Crew consist has always been bargained locally and has never been the subject of a national agreement. The UTU has taken the position here that it cannot become a national subject without UTU consent and the Carriers have implicitly recognized this by requesting either a wage reduction or, alternatively, a national crew consist agreement.

The Board is of the view that the UTU position is the correct one and that crew consist, as such, is not appropriately before this Board. However, since the carriers have made a valid proposal for a reduction in pay, which is before this Board, the Board believes

that the parties' best interests would be served if it made some recommendations regarding the pay of UTU-represented employees in order to help to resolve the parties' longstanding impasse rather than simply dropping the matter on legal grounds.

The Board does not believe that a wage reduction program as suggested by the Carriers should be undertaken. It also agrees with the UTU that crew consist cannot be handled nationally. On the other hand, it does believe that the matter must be bargained to resolution in 1991. Accordingly, the Board makes the following recommendations which should be part of the national agreement:

> a. Notwithstanding any local moratorium, either party may serve a local notice requesting changes in crew consist. Such notice should be handled on a local basis.
>
> b. The parties should bargain locally. If agreement has not been reached by October 31, 1991, either party may request binding arbitration. Within 10 working days of the request for arbitration being served on the other side, the parties shall choose three arbitrators to resolve the dispute. In the event that the parties cannot agree on three arbitrators within the ten days, either side may request the National Mediation Board to name the three arbitrators, who shall be paid jointly by the parties. The arbitration panel shall render its decision within sixty days of its appointment, or by December 31, 1991 whichever occurs first.

c. The arbitration panel should have the power to resolve any crew consist dispute brought before it. In making its decisions, the panel should be guided by the standard that the party making the request shall have the burden of proving that such a change does not diminish safety or efficiency, is consistent with industry practice, and will not increase the costs of operations substantially. The panel should also be guided by standards in those agreements which have been entered into by other carriers and the UTU on properties which are contiguous with those of the involved carrier.

d. If the parties reach an agreement on the crew consist issue by April 1, 1991, each member of the UTU who is covered by such agreement should receive a one thousand dollar ($1000.00) signing bonus. In the event that agreement is reached by May 1, 1991, that signing bonus should be nine hundred dollars ($900.00). For each month that passes without an agreement having been reached, the signing bonus should be reduced by one hundred dollars ($100.00) until October 31, 1991, when the signing bonus should be eliminated.

2. Mandatory Promotion

The Carriers have proposed that individuals who are filling blankable second brakeman positions and who are eligible for

promotion to either conductor or engineer should be required to take such promotions. The UTU argues that the present rule should not be changed.

It is the Board's view, and it so recommends, that all brakemen who are offered promotion to conductor should be required to accept such promotion. Promotion to engineer from conductor should not be made mandatory.

G. BLE-Specific Issues

The Carriers did not raise any BLE-specific issues before the Board. The BLE proposed longevity pay, holiday pay, sick leave, long-term disability pay, changes in held-away-from-home terminal rules, a scope clause, extra pay when an engineer is used as an instructor, a right to lay off when other qualified employees are available, and the creation of a national hiring pool. In each case the Carriers opposed such changes.

The Board believes that only the suggested changes to the collective bargaining agreement specifically dealt with in this Report should be made at this time.

1. Exclusive Representation

The BLE proposes a national rule to provide that the certified or recognized collective bargaining agent for locomotive engineers will be the exclusive representative of such engineers for grievance purposes as well as for the bargaining of collective bargaining agreements. By law the certified or recognized collective bargaining agent has exclusive jurisdiction over the making of collective bargaining agreements on behalf of the employees in the craft it represents; however, in

the handling of individual grievances there has evolved a practice of "dual representation" of locomotive engineers. Since many of the locomotive engineers have been promoted from the ranks of operating employees represented by the United Transportation Union, individual employees, when filing grievances, have asked to be represented by the UTU. The extent of such requests is unknown, but the BLE has indicated before this Board that representation of

* * *

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No. 95-912

In the Supreme Court of the United States

October Term, 1995

LEONARD HIATT, et al., *Petitioners*

v.

UNION PACIFIC RAILROAD COMPANY, and
UNITED TRANSPORTATION UNION, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENT UNION PACIFIC RAILROAD COMPANY'S BRIEF IN OPPOSITION

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LIST OF PARTIES

Respondent Union Pacific Railroad Company is a wholly owned subsidiary of Union Pacific Corporation. The nonwholly owned subsidiaries of Respondent Union Pacific Railroad Company are:

Alameda Belt Line
Automated Monitoring & Control International, Inc.
Camas Prairie Railroad Company
Central California Traction Company
The Denver Union Terminal Railway Co.
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Longview Switching Co.
MT Properties, Inc.
Oakland Terminal Railway
The Ogden Union Railway & Depot Company
Peoria and Pekin Union Railroad Company
Portland Terminal Railroad Company
Portland Traction Company
St. Joseph & Grand Island Railway Company
St. Joseph Terminal Railroad Company
Transportation Data Xchange
TTX Company

Missouri Pacific Railroad Company is a wholly owned subsidiary of Union Pacific Corporation. The nonwholly owned subsidiaries of Missouri Pacific Railroad Company are:

The Alton & Southern Railway Co.
Arkansas & Memphis Railway Bridge and Terminal Co.
The Belt Railway Company of Chicago
Brownsville & Matamoros Bridge Company
Houston Belt & Terminal Railway Company
Kansas City Terminal Railway Company
Southern Illinois and Missouri Bridge Company
Terminal Railroad Association of St. Louis
Texas City Terminal Railway Company
TTX Company
Wichita Union Terminal Railway Company

Union Pacific Resources Group Inc. is a nonwholly owned subsidiary of Union Pacific Corporation.

Respondent Union Pacific Railroad Company, together with Union Pacific Corporation and Missouri Pacific Railroad Company, filed a merger application with the Interstate Commerce Commission on November 30, 1995, for approval of its proposed merger with the Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and the Denver and Rio Grande Western Railroad Company.

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STATEMENT OF JURISDICTION

Respondent Union Pacific Railroad Company submits that the lower courts lacked subject matter jurisdiction because section 3(g) of Public Law 102-29 (Pet. App. 548a) precludes judicial review of the subject matter of this case. Otherwise, Union Pacific does not object to Petitioners' Statement of Jurisdiction.

No. 95-912

In the Supreme Court of the United States

October Term, 1995

LEONARD HIATT, et al., *Petitioners*

v.

UNION PACIFIC RAILROAD COMPANY, and
UNITED TRANSPORTATION UNION, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENT UNION PACIFIC RAILROAD COMPANY'S BRIEF IN OPPOSITION

Respondent Union Pacific Railroad Company ("Union Pacific") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the decision of the Court of Appeals for the Tenth Circuit.

STATEMENT OF FACTS

This case involves an Act of Congress (Public Law 102-29) that settled the 1991 nationwide railway strike involving most of the nation's railroads, including respondent Union Pacific Railroad ("Union Pacific"), and the majority of the unions representing their employees, including respondent United Transportation Union ("UTU"). One suit below was brought by Union Pacific brakemen who are members of the UTU. A companion case was also filed by different plaintiffs against respondent Burlington Northern Railroad and the UTU. This case involved a different collective bargaining agreement, but presented many of the same legal issues. The district court granted summary judgment in this age discrimination case in favor of all defendants, and the Court of Appeals for the Tenth Circuit affirmed.

Petitioners incorporate by reference the statement of facts in United Transp. Union v. United States, 987 F.2d 784 (D.C. Cir. 1993). However, that case does not provide an adequate statement of facts relevant to this case. The following additional facts are pertinent.

In 1990, the National Mediation Board advised the President of the United States that the ongoing negotiations between the major railroads and the railroad unions had broken down and threatened to disrupt interstate commerce. Pursuant to his statutory authority under the Railway Labor Act, see 45 U.S.C. § 160, the President appointed Presidential Emergency Board No. 219 ("PEB 219"). After hearings, PEB 219 made recommendations for a resolution of the various disputes between the railroads and the railroad unions. The unions refused to accept these recommendations and a nationwide rail strike ensued on April 17, 1991. That

same day, Congress intervened and enacted the recommendations of PEB 219 into law. This bill, now codified as Public Law 102-29, was signed by the President the next day, bringing the strike to an end. Section 2 of Public Law 102-29 required the President to appoint a Special Board which had power to modify or clarify the recommendations of PEB 219.

Historically, on Union Pacific Railroad, brakemen have been promoted to conductor. Those persons who were promoted to conductor retained their brakeman seniority dates, but also established a conductor's seniority date that was later than their brakeman's seniority date. Promotion to conductor was voluntary and some brakemen chose to forego promotion (or did not pass the required examination). The Plaintiffs are all such "unpromoted" brakemen.

One of the recommendations of PEB 219, which was codified by Public Law 102-29, was that promotion from brakeman to conductor be made mandatory, rather than voluntary. The UTU requested that the Special Board withdraw the requirement of mandatory promotion from brakeman to conductor, but the Special Board refused this request. After the Special Board issued its determinations, the National Carriers Conference Committee (which includes Union Pacific Railroad and Burlington Northern Railroad) and the UTU agreed to National Implementing Documents for Public Law 102-29. These Documents ratified the mandatory promotion requirement and provided that, "Except as modified hereby, existing rules and practices governing promotion continue in effect." See Appellants' 10th Cir. Appendix, A415 & A439; see generally Local 1389 v. United Transp. Union, 146 Lab. Rel. Rep. (BNA) 2998, 2999-3000 (E.D. Ky. 1992)(summarizing history of 1991 rail strike and

mandatory promotion issue).

Subsequently, Union Pacific Railroad and the UTU entered into the February 1, 1992 Crew Consist Agreement that was challenged in the underlying lawsuit. That agreement provided for a reduction in the number of brakeman positions and, as required by Public Law 102-29, for the mandatory promotion of brakemen to conductor. No other changes were made in the seniority system for conductors. Thus, mandatory promotion meant that those brakemen who had previously not been promoted to conductor would go to the bottom of the conductor's seniority roster, below brakemen who had taken promotion in earlier years. See Appellants' 10th Cir. Appendix, A132-A138. Because the reduction in the number of brakemen positions may have limited the opportunities for Plaintiffs to exercise their existing brakeman's seniority and because they would have to go to the bottom of the conductor's seniority roster, the Plaintiffs (unpromoted brakemen) felt negatively affected by the Crew Consist Agreement.

REASONS WHY THE PETITION SHOULD BE DENIED

1. Petitioners' First Question: The Court of Appeals' Decision That Mere Knowledge of Disparate Impact Does Not Destroy the "Bona Fide Seniority System" Exemption Under the ADEA Does Not Conflict with the Decision of Any Other Court of Appeals and Applies Well Settled Law

Petitioners' first Question Presented is whether the "bona fide seniority system" exemption under the Age Discrimination in Employment Act, 29 U.S.C. §

623(f)(2)(A), is applicable where "the system was changed in a manner known to result in disproportional disadvantage [to] brakemen within the age protected group." The Question, as phrased, is factually incorrect. The only change to the existing seniority arrangements for conductors and brakemen was the mandatory promotion required by Congress in Public Law 102-29 -- which Plaintiffs did not (and could not) challenge. See Pet. App. 5a-7a. As the Court of Appeals noted, "The Plaintiffs ... admit that they were treated no differently under the seniority system than other newly promoted conductors." (Pet. App. 10a). Thus, as Petitioners themselves concede, the legal issue actually presented is whether "the parties were obligated to negotiate a new or different seniority system to avoid discriminating against the older brakemen." Petition for Writ of Certiorari, p. 17 (emphasis added).

In other words, the question presented is whether an employer and union are required to change an otherwise bona fide seniority system simply because they have knowledge that the unchanged system, as applied, will produce a disparate impact on older employees. The precedents of this Court unequivocally hold that no such changes are required. In American Tobacco Co. v. Patterson, 456 U.S. 63 (1982), the Court interpreted the identically worded "bona fide seniority system" exemption under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h). The Court held that "the fact that a seniority system has a discriminatory impact is not alone sufficient to invalidate the system; actual intent to discriminate must be proved." Id. at 65; accord, Pullman Standard v. Swint, 456 U.S. 273, 277 (1982); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 352-55 (1977).

As the Court of Appeals noted in its opinion (Pet. App. 9a), Petitioners essentially conceded that the preexisting conductor seniority system -- under which a seniority date was established when a person entered the craft -- was bona fide, and they offered no evidence that intentional age discrimination played any role in the establishment or maintenance of this longstanding seniority arrangement. In fact, Petitioners did not claim to have any knowledge concerning any negotiations between Union Pacific and the UTU. Unless there is evidence of intentional discrimination, the "bona fide seniority system" exemption is applicable. See Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 82 (1977)("absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences").

The legal theory under which Petitioners proceeded -- that the Respondents were under an obligation to change the conductor seniority system solely because it allegedly had a disparate impact -- is squarely inconsistent with the precedents of this Court. The Court of Appeals correctly held that the "bona fide seniority system" exemption in the Age Discrimination in Employment Act precluded Plaintiffs from pursuing a "disparate impact" challenge. Moreover, Petitioners do not point to any precedent allowing such a disparate impact challenge to a bona fide seniority system. Because of the absence of any important question of federal law and of any conflict among the courts of appeals, Petitioners' first Question Presented is not appropriate for review by certiorari. See Sup. Ct. R. 10.

2. Petitioners' Second Question

Petitioners' second Question Presented asserts that the

district court procedurally erred by granting summary judgment before discovery was complete.

a. The District Court Did Not "Convert" Union Pacific's Motion to Dismiss Into a Summary Judgment Motion "Without Notice"

Petitioners' second Question Presented asserts that the district court "converted" Union Pacific's motion to dismiss into one for summary judgment "without notice." This formulation of the Question Presented is factually incorrect, since Petitioners were well aware that Union Pacific sought summary judgment in the district court. In fact, Union Pacific's motion was expressly stated to be one for "summary judgment" and the parties extensively briefed and argued whether summary judgment was appropriate. See, e.g., Pet. App. 92a, 99a, 115a. Plaintiffs' counsel recognized that the proceedings had "been converted into a Rule 56 kind of situation" [Pet. App. 469a], and discussed the factual issues that he believed precluded summary judgment for defendants [Pet. App. 441a-48a].

b. The Procedures Followed by the Lower Courts in This Case Were Proper Under Fed. R. Civ. P. 56(f) and Did Not Depart from the Accepted and Usual Course of Judicial Proceedings

The district court granted summary judgment before discovery was complete. There is no requirement that summary judgment be withheld until discovery is complete. Rule 56(f) makes it possible for a party to postpone summary judgment pending further discovery, but "only if the

nonmoving party files an affidavit explaining why he or she cannot present facts to oppose the motion." See Dreiling v. Peugeot Motors of America, Inc., 850 F.2d 1373, 1376 (10th Cir. 1988); Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1522 (10th Cir. 1992)(unverified statement of counsel will not satisfy Rule 56(f)); Weir v. Anaconda Co., 773 F.2d 1073, 1081-82 (10th Cir. 1985).

Here, Plaintiffs chose not to submit the affidavits required by Rule 56(f); as they state in their Petition (p. 7), "no Rule 56(f) affidavit was deemed warranted." Thus, under well established Tenth Circuit precedent, the district court acted within its discretion by granting summary judgment without further discovery:

> Where a party opposing summary judgment and seeking a continuance pending completion of discovery fails to take advantage of the shelter provided by Rule 56(f) by filing an affidavit, there is no abuse of discretion in granting summary judgment if it is otherwise appropriate.

Pasternak v. Lear Petroleum Exploration, Inc., 790 F.2d 828, 832-33 (10th Cir. 1986). See Patty Precision v. Brown & Sharpe Mfg. Co., 742 F.2d 1260, 1264-65 (10th Cir. 1984)(district court's discretion in denying discovery in absence of satisfactory Rule 56(f) affidavit "will rarely be disturbed"); Dreiling, supra, 850 F.2d at 1376-77.

Even if Plaintiffs had filed a Rule 56(f) affidavit, they could not have avoided summary judgment. A Rule 56(f) affidavit must show how discovery "would enable [plaintiff] to meet its burden in opposing summary judgment," and a "mere assertion that discovery is incomplete" is not sufficient. See Pasternak, supra, 790 F.2d at 833; see Universal Money

Centers, Inc. v. AT&T, 22 F.3d 1527, 1536 (10th Cir.), cert. denied, 115 S. Ct. 655 (1994). None of the repetitious affidavits submitted by the Plaintiffs (see Pet. App. 127a-403a) says that the affiant has any personal knowledge about the negotiations of the Crew Consist Agreement. Instead, these affidavits merely assert that the negotiators must have been aware of the alleged "disparate impact" of the mandatory promotion required by Public Law 102-29.

Even if these allegations were accepted, they would be legally insufficient, and would not require further discovery. Where a case is dismissed on legal grounds, "further factual development [is] unnecessary" and there is no abuse of discretion in denying further discovery. DeVargas v. Mason & Hanger-Silas Mason Co., 911 F.2d 1377, 1393 (10th Cir. 1990), cert. denied, 498 U.S. 1074 (1991); see Patty Precision v. Brown & Sharpe Mfg. Co., 742 F.2d 1260, 1264-65 (10th Cir. 1984). Where a plaintiff has "no evidence whatsoever" of improper motivation by the defendant, but "merely suspects that he could find such evidence if given a chance, he is not entitled to pursue such a fishing expedition in federal court." Jarvis v. Nobel/Sysco Food Service Co., 985 F.2d 1419, 1422-23 n. 4 (10th Cir. 1993).

On the facts of this case, where Plaintiffs chose not to submit the affidavit required by Rule 56(f), the grant of summary judgment prior to the completion of discovery was fully justified by Tenth Circuit precedent. Moreover, Petitioners have not identified any precedent from another court of appeals that is inconsistent with Tenth Circuit precedent under Rule 56(f), and, in fact, there is no such inconsistency. See Paddington Partners v. Bouchard, 34 F.3d 1132, 1137 (2d Cir. 1994)("failure to file Rule 56(f) affidavit is itself sufficient grounds to reject a claim that the

opportunity for discovery was inadequate"); King v. Cooke, 26 F.3d 720, 726 (7th Cir. 1994), cert. denied, 115 S. Ct. 1373 (1995)("when a party does not avail himself of relief under Rule 56(f), it is generally not an abuse of discretion for the district court to rule on the motion for summary judgment"); Terrell v. Brewer, 935 F.2d 1015, 1018 (9th Cir. 1991)(denial of Rule 56(f) application proper where it is clear that evidence sought "is the object of pure speculation"); Krim v. BancTexas Group, Inc., 989 F.2d 1435, 1443 (5th Cir. 1993)(plaintiff not entitled to Rule 56(f) continuance where he failed to specify materials he hoped to obtain with further discovery and exactly how those would create a genuine issue of material fact); Paterson-Leitch Co., Inc. v. Mass. Municipal Wholesale Electric Co., 840 F.2d 985, 989 (1st Cir. 1988)(Rule 56(f) discovery not justified where plaintiff failed to set forth basis for believing that some discoverable material facts existed and to show how the facts sought, if obtained, would help defeat summary judgment motions); Humphreys v. Roche Biomedical Laboratories, Inc., 990 F.2d 1078, 1081 (8th Cir. 1993)(plaintiffs not entitled to further discovery before summary judgment where plaintiffs failed to file affidavit specifying what further discovery might unveil and its relevance to issues pleaded). Therefore, since there is no conflict among the circuits and because the Court of Appeals did not depart from "the accepted and usual course of judicial proceedings," Petitioners' second Question Presented is not appropriate for review on writ of certiorari. See Sup. Ct. R. 10.

3. Petitioners' Third Question

a. Petitioners Offered No Evidence of Intentional Discrimination and Such Factual Issues Are Not Appropriate for Review by Writ of Certiorari

Petitioners' third Question Presented asserts that the district court and court of appeals erred by holding that the Plaintiffs had failed to establish that the "Defendants' reasons for its [sic] actions were pretextual in their disparate treatment claim." The district court held that Plaintiffs failed to identify evidence that Union Pacific and the UTU's adoption of the Crew Consist Agreement, which implemented the Congressional requirement of mandatory promotion to conductor, was a "pretext for intentional and unlawful discrimination on the basis of age." Pet. App. 40a-41a. The Court of Appeals conducted an "independent review of the record" on this point, and concluded that the most that the Petitioners had shown was that "they were inconvenienced by the obligatory promotion to conductor." Pet. App. 11a.

In this Court, Petitioners urge (p. 10) that these factual holdings should be reviewed de novo. This is incorrect. Rule 10 of the Supreme Court Rules states, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." See, e.g., Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949)("a court of law, such as this Court is, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error").

In any event, there was no evidence of intentional age

discrimination in the negotiation of the Crew Consist Agreement challenged by the Petitioners. Petitioners argue that the numerous repetitive affidavits that they submitted in the district court are a sufficient basis from which discriminatory intent could be inferred. Petitioners point to the assertions in these affidavits that Union Pacific and the UTU "refused to consider" the fact that mandatory promotion would (allegedly) result in older employees with less conductor seniority doing less desirable work than younger employees with more conductor seniority. Petitioners urge that it would have been "impossible" for Union Pacific and the UTU "not to have known" of this "disparate impact," and assert that such knowledge is "evidence of disparate treatment." Petition, p. 13.

Mere knowledge of disparate impact is not a sufficient basis from which to infer intent to discriminate:

> "Discriminatory purpose" ... implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Personnel Administrator v. Feeney, 442 U.S. 256, 279 (1979)(citations omitted).

This general principle is particularly applicable in the context of seniority arrangements. Virtually every seniority system will have some sort of statistical impact on some grouping of employees, whether based on age, race, sex, or ethnic origin. If knowledge of such potential adverse impacts constituted intentional discrimination, the collective

bargaining process would be effectively deadlocked. As the Court of Appeals for the Seventh Circuit has reasoned,

> Bargaining has winners and losers.... Unless its leaders are unfathomably dense, the union knows who wins and who loses. The losers always may say that the union "intended" them to lose. As all of society is an assembly of minorities, the losers can point to some respect (age, sex, religion, politics, skill, health, membership in the union, status during the most recent strike) in which they are in a minority, and insist that the distinction must have been part of a "bad faith" plot to "penalize" them on account of that status. Taken to its limits, the approach prevents the union from resolving differences internally and representing the interests of workers as a group. Yet one of the premises of the Railway Labor Act (like the National Labor Relations Act) and a requirement of the Labor-Management Reporting and Disclosure Act, is that unions act democratically to reach a collective decision -- the majority is entitled to prevail.

Rakestraw v. United Airlines, Inc., 981 F.2d 1524, 1529-31 (7th Cir. 1992), cert. denied, 114 S. Ct. 286 (1993).

b. The Courts of Appeals Agree That the ADEA Does Not Impose Any Duty of "Accommodation"

Petitioners have not identified evidence that Respondents had any affirmative intention to discriminate

against older employees. Instead, they complain about inaction by the railroads and the union -- that is, their failure to take steps to treat Petitioners more favorably than other workers. They assert that the railroad and union defendants were required to adopt new seniority arrangements, such as "dovetailing" seniority, that would prevent workers in a job category where the workers are allegedly older (on average) from being disadvantaged.[1] Their theory (Petition, p. 15) is that the Age Discrimination in Employment Act imposes an affirmative obligation to ensure that older workers are not disadvantaged by changes in workplace rules (in this case, a change mandated by Congress). There is no such requirement under the ADEA.

The courts of appeals are in agreement that, as the Tenth Circuit held in this case, there is no requirement in the ADEA of accommodation or preferential treatment for older workers. See Bovers v. Flying Tiger Line, Inc., 979 F.2d 291, 298 (2d Cir. 1992)(ADEA "does not entitle [older

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[1] Plaintiffs have consistently asserted their theory that the ADEA mandates affirmative acts to avoid harm to older workers. For example, their brief in opposition to summary judgment charged that "there was no attempt by these defendants to preserve these employees' years of service's earned job conditions" and that defendants failed to take steps "designed to ensure that the age protected employees would not be discriminated against." Pet. App. 100a. Similarly, the affidavits submitted in opposition to summary judgment stressed the respondents' inaction. See, e.g., Affidavit of Leonard Hiatt, Pet. App. 129a (Union Pacific and the UTU "decided to stick their heads in the sand and disregard all the years of service that myself, other plaintiffs, and other older workers had"). Forty-six affidavits contained an identical assertion of inaction: "There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented...." Pet. App. 136a-37a & 140a-319a.

persons] to protection against all negative employment decisions, when these are made for reasons independent of their age"); Cova v. Coca-Cola Bottling Co., 574 F.2d 958, 960 (8th Cir. 1978)(ADEA "does not require that advanced age and substantial length of service entitle employees to special favorable consideration"); Williams v. General Motors Corp., 656 F.2d 120, 129 (5th Cir. 1981), cert. denied, 455 U.S. 943 (1982) (ADEA "does not place an affirmative duty upon an employer to accord special treatment to members of the protected age group"; rather, age "is accorded neutral status ... neither facilitating nor hindering" employment); Tice v. Lampert Yards, Inc., 761 F.2d 1210, 1217 (7th Cir. 1985)(same); Fink v. Western Electric Co., 708 F.2d 909, 915 (4th Cir. 1983)(same)(dictum); Branson v. Price River Coal Co., 853 F.2d 768, 772 (10th Cir. 1988)("ADEA does not require employers to accord members of the protected class preferential treatment, but only that they treat age neutrally"). Because there is no conflict among the circuits and no unsettled question of federal law, the issue is not appropriate for review by writ of certiorari. See Sup. Ct. R. 10.

4. Petitioners' Fourth Question: The Court of Appeals Did Not Decide Whether the "Adverse Impact" Doctrine Applies to Age Discrimination Cases

Petitioners' fourth Question Presented addresses whether the "district court, in a decision affirmed by the appellate court," erred in holding that the disparate impact doctrine is inapplicable to cases arising under the Age Discrimination in Employment Act. In fact, the Court of Appeals for the Tenth Circuit did not affirm the district court on this issue. Instead, it held that the issue of the disparate

impact issue under Title VII need not be resolved because the seniority system was exempt from the ADEA under the "bona fide seniority system" exemption. Pet. App. 8a.

Petitioners have sought a writ of certiorari directed to the Court of Appeals for the Tenth Circuit, not the district court. The court of appeals did not resolve the issue addressed in Petitioners' fourth Question. Therefore, there is no conflict between the Tenth Circuit and other courts of appeals with respect to the adverse impact theory under the ADEA, and certiorari is not appropriate with respect to that question. See Sup. Ct. R. 10. Instead, if this Court granted certiorari and reversed on issues actually resolved by the appellate court, only then might it be appropriate for the ADEA disparate impact issue to be remanded to the court of appeals for consideration as an initial matter. See, e.g., FTC v. Travelers Health Ass'n, 362 U.S. 293, 298 n. 4 (1960); FCC v. WJR, Inc., 337 U.S. 265, 285 (1949).

5. The Lower Courts Had No Subject Matter Jurisdiction Over This Case

Section 3(g) of Public Law 102-29 (Pet. App. 548a) provides, "There shall be no judicial review of any report or determination of the Special Board under this section." One of the determinations of the Special Board was that promotion from brakeman to conductor should be mandatory. See Pet. App. 553a (report of PEB 219); App. 10th Cir. App. A52-53, A112, A125-28 (Special Board's refusal to modify report of PEB 219). The court of appeals held that Public Law 102-29 did not deprive the lower courts of jurisdiction because the Petitioners did not challenge the mandatory promotion required by the Special Board, "but the manner in which the Defendants carried out their statutory duties." Pet.

App. 7a.

Respondent Union Pacific respectfully submits that the court of appeals erred in finding that subject matter jurisdiction existed. Congress (via the Special Board) required the mandatory promotion of brakemen to conductor. As the court of appeals recognized, "the alleged harm was caused solely by the interaction of the congressional mandate and the established seniority system." Pet. App. 11a. Since there was no change in the existing seniority system except for the change required by Congress, section 3(g) of Public Law 102-29 deprived the lower courts of jurisdiction to review the consequences of the change required by Congress.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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No. 95-912

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

LEONARD HIATT, *et al.*,
Petitioners,
v.
UNION PACIFIC RAILROAD COMPANY, a Utah Corporation;
UNITED TRANSPORTATION UNION,
Respondents.

JEROME SMITH, *et al.*,
Petitioners,
v.
BURLINGTON NORTHERN RAILROAD COMPANY,
a Delaware Corporation;
UNITED TRANSPORTATION UNION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT UNITED TRANSPORTATION UNION'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

(1) Whether the Court of Appeals properly held that the Plaintiff's claims lacked a basis in law because of the operation of a *bona fide* seniority system.

PARTIES TO THE PROCEEDINGS BELOW

A. *Hiatt v. Union Pacific*, Case No. 94-8088

Leonard K. Hiatt; Robert A. Bagby; Marvin Crabaugh; Gary W. Boatright; Ronald L. Roberson; Carl D. Houk; Jerrold B. Hutchins; Duane K. Hinkle; Larry L. Burbank; Stephen J. Miller; Kim R. Hardman; Kenneth B. Covington; Michael E. Valentine; Gary L. Yanken; Patrick M. Herrley; Mike I. Carlson; Randall O. Swarthout; Sammy L. Cross; Darrel D. Miller; Ronald L. Stoddard; James D. Tolle; Larru S. Clark; Robert T. Epler; Richard W. Cavender; Dale Young; Robert F. McIntosh; Julian R. Nelson; Walter T. Gronek; Ronald E. Ostendorf; Ronald R. Johnson; Melvin E. Sayre; Robert F. Lannon; Gerald T. Dueling; Philip J. Eberhardt; Roxie L. Jackson; Russell P. Eggers; Ron G. Van Northwick; Thomas M. McMurtry; Larry R. Mann; Maurice F. McDonald; Donald A. Raschke; Cleo D. Schroeder; Kenneth W. McIntosh; Robert A. Podjenski; Gilbert R. Throm; Donald K. Peters; Robert G. Wenzel; Cecil B. Miller; Leroy W. Roth; James L. Wells; Charles F. Smartt; James W. Jenkins; John J. Stamate; Gerry W. Spinden; David E. Dupree; Donald R. Smith; ames P. Manary; Ronald B. Hunt; Robert E. Williams; Dennis J. Smith; Gary E. Metcalf; Benny L. Covington; Robert E. Wedgwood; Norman R. Thomas; Jon L. Stone; Steven L. Brown; John R. Holloway; Warren H. Bush; Edward W. Berardino, Plaintiffs-Appellants; and,

Union Pacific Railroad Company, Defendant-Appellee; and,

United Transportation Union, Defendant-Appellee.

B. Smith v. Burlington Northern Railroad, Case No. 94-8089

Jerome J. Smith; Michael R. Ramold; Michael X. Kosmicki; Richard J. McCune; Daniel L. Eastman; Donald E. Looker; Robert A. Harger; Steven L. Burbach; Donald S. Seghi; Roland G. Beard; Earl J. Vance; Bruce O. Staf-

ford; Richard K. Loehning, Jr.; Tracy B. Miller; Gary L. Jones; Robert M. Hagy; William A. Myers; Gene F. Noonan; Kenneth J. Puchalski; Robert L. Keenan; Robert F. Garland; David A. Growe; Michael P. O'Neil; Timothy J. Hoppe; Albert G. Kelsch; Steven F. Massey; John M. Crawford; Tarrell L. Newman; Bill G. Hamilton; Verl W. Moore; Charles W. Rohe; Albert W. Greenwood; Gerald A. Gompert; Gary L. Katiepolt; Dick C. Jones; Jon Lutz; Charles D. Barnhill; Larry G. Wright; Thomas W. Schaefer; John C. Rosenstock; Steven E. Bishop; Roger G. Mazanec; Edward Jay Deitz; Steve V. Brew; Lavern L. Brown; Donald Masek; Donald Rosekrans; Robert H. Hall; Jack A. Reighard; Roger E. Rohrbouck; James Moritz; Harold Jones, Plaintiffs-Appellants; and,

Burlington Northern Railroad Company, Defendant-Appellee; and,

United Transportation Union, Defendant-Appellee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-912

LEONARD HIATT, *et al.*,
Petitioners,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah Corporation;
UNITED TRANSPORTATION UNION,
Respondents.

JEROME SMITH, *et al.*,
Petitioners,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
a Delaware Corporation;
UNITED TRANSPORTATION UNION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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RESPONDENT UNITED TRANSPORTATION UNION'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondent, United Transportation Union, respectfully request that the Court deny the Petition for a Writ of Certiorari submitted by Petitioners.

OPINIONS BELOW

In Case Nos. 94-8088 and 94-8089 (10th Cir. Sept. 8, 1995), the Court of Appeals affirmed the district court's grant of summary judgment based on the fact that Respondents were acting in accordance with an admittedly *bona fide* seniority system.

The district court's opinion, which is reported at 859 F.Supp. 1416 (D. Wyo. 1994), granted Respondents' motions for summary judgment.

STATUTES INVOLVED

The decision of the Court of Appeals is based on the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* Public Law No. 102-29, 105 Stat. 169 (1991) also plays an important part in this case.

COUNTER STATEMENT OF THE CASE

A. Proceedings Below

Plaintiffs, all unpromoted brakemen, employed by either the Union Pacific Railroad (UPRR) or the Burlington Northern Railroad Company (BNRR) initially filed charges with either the Nebraska Equal Opportunity Commission or the Equal Employment Opportunity Commission. The UPRR employees' charges were handled by the Nebraska Commission and the BNRR employees' charges were handled by the EEOC's regional office in Dallas, Texas. The charges were identical claiming a violation of the ADEA due to the mandatory promotion provision of Presidential Emergency Board No. 219, codified in Pub. L. No. 102-29. After investigations, in separate decisions, both Commissions issued no probable cause findings and right-to-sue letters in April 1993. (Apx. C & D).

Plaintiffs then filed an action in the U.S. District Court for the District of Wyoming alleging a violation of the ADEA. The Respondents filed motions for summary judgment and on August 3, 1994, the district court granted the motions. (Apx. B).

Plaintiffs appealed to the U.S. Court of Appeals for the Tenth Circuit. On September 8, 1995, the Court of Appeals finding that Plaintiffs' claims lacked a sufficient basis in law as Respondents were acting in accordance with an admittedly *bona fide* seniority system, upheld the dismissal of Plaintiffs' claims.

B. Statement of Facts [1]

This case revolves around the interpretation and effect of an Act of Congress which was signed into law on April 18, 1991, by then-President George Bush. *See* Pub. L. No. 102-29 (Apx. 543a). All of the Plaintiffs had been employed by the Defendant railroads as brakemen until they were forced to accept mandatory promotion to conductor. (Apx. 14a).

By way of background, in 1980, Congress passed the Staggers Rail Act, Pub. L. No. 96-448, which essentially deregulated the rail industry. Since that time, the nation's major rail carriers, including Defendants UPRR and BNRR, have attempted to reduce the size of their train crews. (Apx. 17a). Historically, the number of men necessary to form a crew was determined by what are known as crew consist agremeents. A traditional train crew consisted of an engineer, a conductor, a fireman and either two or three brakemen. (*Id.*). Due to technological advances, however, including the advent of the diesel locomotive, the positions of fireman and third brakeman have been obsolete and have been virtually eliminated. *See Brotherhood of R.R. Trainmen v. Akron & Barberton Belt*, 385 F.2d 581, 588-92 (D.C. Cir. 1967); also Apx. 550a.

The carriers, however, have recently demonstrated an increased resistance to the brakeman's position because of their belief that its function is obsolete. (Apx. 18a). As a result, the carriers have attempted to eliminate as many of those positions as possible for obvious economic

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[1] This Statement of Facts is essentially taken from the findings of the District Court.

reasons. (*Id.*). Unfortunately for the carriers, reduction by attrition was too slow and the moratoria provisions in the crew consist agreements prevented the carriers from attempting to reopen negotiations on the issue.[2] As a result, the carriers have retained what they perceive to be the excess brakeman's positions. (Apx. 18a).

In July of 1988, pursuant to the terms of the Railway Labor Act, UTU's General Committees served Section 6 notices on the carriers in an effort to modify particular portions of the then-existing collective-bargaining agreements.[3] Specifically, the unions sought to improve the wages and health care benefits of their members. (*Id.*). The service of the Section 6 notices opened the negotiations but only with respect to the matters designated therein. (*Id.*).

In October of 1988, the carriers filed their own Section 6 notices which contained a counter-proposal seeking dramatic wage cuts for its employees. (*Id.*). Sensing an opportunity to renegotiate the important crew consist issue, the carriers offered an alternative proposal: a smaller wage cut than the one initially proposed in exchange for the unions' agreement to reopen negotiations on the crew consist matter. (*Id.*). The carriers' intent to reduce the number of brakemen by reopening the negotiations on that issue was plainly apparent from their Section 6 notices, which stated that they wanted to require any train service employee to accept a promotion to conductor and/or engine service or forfeit their seniority and terminate the employment relationship. (Apx. 18a-19a).

This so-called "mandatory promotion" requirement forms the basis for the complaints filed in this case. The

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[2] UTU and various carriers, including Defendants, were parties to a 1980 crew consist agreement which provided that further crew reductions would be by attrition and that a moratorium would be in place barring reopening this issue for a specified period of time. (Apx. 17a-18a, 550a-551a).

[3] "Section 6 notice" is an industry term referring to the serving of a formal notice opening certain collective bargaining items for negotiation.

carriers sought to reduce the number of brakemen while at the same time increasing the number of conductors, a position that was undermanned, by promoting the extra brakemen to conductor status. The union, however, refused to consent to renegotiate the crew consist agreements, relying on the moratoria provisions (Apx. 19a; 550a-551a).

As negotiations moved to the national level, it became readily apparent that the negotiations at this level were not going to produce any results, and the parties thereafter sought the assistance of the National Mediation Board (NMB).[4] (Apx. 19a). The NMB's year-long effort to mediate this dispute also failed to resolve this stalemate. The parties subsequently refused to submit their dispute to arbitration. As that point, the NMB certified to President Bush that this dispute could in fact threaten interstate commerce. (*Id.*).

On May 3, 1990, President Bush, acting pursuant to 45 U.S.C. § 160, and in accordance with the recommendations of the NMB, appointed Presidential Emergency Board No. 219 ("PEB" or "the Board") to investigate the dispute between the carriers and the unions and to issue a recommendation. (Apx. 19a-20a).

The Board conducted extensive hearings and heard testimony from numerous interested parties. Both the UTU and the carriers argued the mandatory promotion issue before the Board. (Apx. 20a). The UTU *vehemently opposed* this proposal while the carriers argued that it was necessary because there were too many brakemen positions that were no longer needed and which they were being forced to fund, while they were simultaneously suffering from a shortage of conductors. (*Id.*). Thus, the carriers, claimed that the requirement that brakemen accept a promotion to conductor status would be more efficient and would eliminate the excess brakemen. (*Id.*).

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[4] The NMB is the federal agency designated to assist the parties in resolving "major" disputes. 45 U.S.C. §§ 154-156.

On January 15, 1991, the Board issued its report and recommendations to President Bush. The Board recommended that the carriers' proposal for a wage cut be rejected, and furthermore, that a series of wage increases be given. (*Id.*). In return for the wage increases, however, the Board recommended that the moratoria provisions of the earlier crew consist agreements be lifted, that the parties be permitted to serve Section 6 notices locally on the crew consist issue and that a new round of negotiations on this issue take place. (*Id.*). More importantly here, the Board adopted the *carriers*' position on the mandatory promotion issue and recommended that "all brakemen who are offered promotion to conductor should be required to accept such promotion." (*Id.*).

UTU refused to accept the recommendations of the Board. As a result, on April 17, 1991, UTU engaged in a nationwide legal strike. (Apx. 21a). The strike was short-lived as later that same day, Congress intervened and enacted what was essentially the Board's recommendations ending the strike. The bill containing these recommendations was passed by the House of Representatives and the Senate and signed into law the next morning by President Bush. (Apx. 21a). The bill is codified as Public Law No. 102-29.

Section 2 of that law specifically required the President to appoint a special presidential board ("Special Board") which would be empowered to conduct additional hearings for the purpose of clarifying, interpreting, and, if necessary, modifying the recommendations of PEB 219, now Public Law No. 102-29, if the Special Board determined that they were demonstrably inequitable or materially erroneous. (Apx. 21a).

Pursuant to this congressional mandate, President Bush appointed a three-member Special Board on July 18, 1991. The UTU appealed the Board's ruling on the mandatory promotion arguing that it was unfair and improper. The Special Board, however, rejected UTU's appeal on the grounds that the Board's ruling was fair and not materially erroneous. (*Id.*). As expected, the terms of the

new agreements incorporated the mandatory brakemen promotion requirement. (Apx. 22a). UTU, still outraged over PEB 219, filed suit challenging the constitutionality of Pub. L. No. 102-29. *United Transportation Union v. United States*, 987 F.2d 784 (D.C. Cir. 1993). UTU's challenge was unsuccessful.

For many older brakemen, however, promotion held, and holds, little allure. Under the seniority system long in place in the railroad industry, brakeman seniority does not carry over when one is promoted to conductor.[5] (Apx. 6a). Thus, a newly promoted conductor begins with no seniority, and takes his or her place at the bottom of the duty roster. (*Id.*).

The Plaintiffs herein acknowledge that Public Law No. 102-29, as implemented by the Special Board, required that they be promoted to conductor. They do not challenge that promotion. (Apx. 6a, 10a). Rather, they attack the manner in which the Defendants effected the elimination of the brakeman position . (*Id.*). Specifically, the Plaintiffs contend that the Defendants failed to take measures to mitigate the uniquely deleterious impact of promotion upon them (Apx. 7a). The Plaintiffs assert that the Defendants could have preserved the ability of older brakemen to control their work schedules either by dovetailing brakeman seniority with conductor seniority or by otherwise redistributing the workload to spare older brakemen the more arduous tasks. (*Id.*). The Plaintiffs claim that the failure of the Defendants to take these (or similar) steps gives rise to their claims. (Apx. 7a). Plaintiffs, however, admit that they were treated no differently under the seniority system than other newly promoted conductors. (Apx. 10a). In essence, the Plaintiffs argument reduces to the proposition that they should not be

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[5] Brakeman seniority is retained upon promotion to conductor, and in fact continues to accrue as one works as a conductor. The retained seniority is only relevant, however, when a brakeman chooses to bid for one of the very few remaining brakeman duty slots. Brakeman seniority cannot be used to bid for conductor positions. (Apx. 6a n.1).

subject to the routine operation of the seniority system; rather, it should be modified to accord them favorable treatment. (Apx. 10a).

SUMMARY OF ARGUMENT

The Plaintiffs fail to establish any compelling reason to review the appellate court's decision based on a *bona fide* seniority system. The decision is correct and well within the law and reason. There is absolutely no difference of opinion with regard to the statement and application of the law by the circuit court.

Plaintiffs, rather wish this Court to ignore the circuit opinion which correctly decides this whole matter and focus on pedestrian issues at the district court level. Despite this Court's direction and history of only accepting appellate cases of compelling magnitude, Plaintiffs wish this Court to act as a second court of appeals which it is clearly not disposed to do.

REASONS FOR DENYING THE WRIT

I. PETITIONERS/PLAINTIFFS FAIL TO ESTABLISH A BASIS FOR REVIEW OF THE APPELLATE COURT'S DECISION

A *writ of certiorari* is not a matter of right, but of judicial discretion. S.Ct. Rule 10. A *writ* is granted only for compelling reasons and generally not for asserted errors of findings or the misapplication of a properly stated rule of law. *Id., Fay v. Noia*, 372 U.S. 391, 336 (1963); Wright & Miller, 16 Fed. Prac. & Proc. § 4004 et seq (1988).

The Court considers such "compelling reasons" as those where there is a conflict between *circuit* courts on an important matter, or that a *circuit* court has decided an important question of federal law that has not been decided, but should be decided by this Court, or that a *circuit's* decision is in direct conflict with the decision of this Court. S.Ct. Rule 10(a), (c); *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951).

Here, Plaintiffs point to no such basis for appeal or to even any compelling reason whatsoever for a *writ* to be granted. Indeed, Plaintiffs' complete argument concerning the decision of the Tenth Circuit comprises approximately one page. (Ptn. at 17-18). In the second of the two paragraphs, they assert the whole of their position that the Defendants "were obliged to negotiate a new and different seniority system" for them. Plaintiffs present no authority for such a statement which is clearly contrary to the requirements of the Act. 29 U.S.C. § 623(f)(2)(A); *Firefighters for Racial Equality v. Bach*, 731 F.2d 664, 668 (10th Cir. 1984). Furthermore, Plaintiffs, in this minimal argument, make no assertion that there is any serious question at issue or that there is a circuit conflict or a conflict with this Court's decisions. Nor do Plaintiffs take any exception with any finding of the Court of Appeals. Rather, Plaintiffs' sole assault on the Tenth Circuit's decision is that it is not ripe on the seniority system issue due to a lack of discovery. As earlier, however, Plaintiffs fail to support such an outlandish statement with any reasoning, let alone authority.

What Plaintiffs fail to grasp is that they are asking for something the law does not require. As the circuit court noted, the ADEA specifically provides that it is *not* unlawful "to observe the terms of a bona fide seniority system." (Apx. 8a-10a); also, 29 U.S.C. § 623(f)(2); *Dalton v. Mercer Co. Bd. of Educ.*, 887 F.2d 490, 492 (4th Cir. 1989). In seniority system cases, a plaintiff's only avenue of attack is disparate treatment, as a plaintiff must show that the seniority system was adopted with intent to discriminate. *Firefighters for Racial Equality v. Bach*, 731 F.2d 664, 668 (10th Cir. 1984) citing *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 354-56 (1977); *see also Pullman-Standard v. Swint*, 456 U.S. 273, 276-77 (1982); *American Tobacco Co. v. Patterson*, 456 U.S. 63 64-65 (1982); *Harvey v. United Transportation Union*, 878 F.2d 1235, 1242-43 (10th Cir. 1989). In *Teamsters*, this Court noted that where a seniority system in place, applied equally to

all employees, negotiated and implemented free from any illegal purpose it is a defense. *Teamsters* at 355-56. Such a seniority exception exists so that the existing vested rights of employees can be honored. *Firefighters* at 668.

Here, Plaintiffs admit that the seniority system is *bona fide*. (Apx. 9a) It had *long* been in place and uses as its basis length of service. What Plaintiffs want is for the petitioners to negotiate a completely new seniority system abandoning the system in place in the railroad industry from its inception. (Ptn. at 17) There is simply no basis in the law or common sense for any such requirements Plaintiffs' baseless demand for preferential treatment can not be a basis for a grant of a *writ*.

Here, the UTU merely abided by the seniority system which had been long in place, applied equally to all, and was the well-established method throughout the industry of obtaining seniority in a craft. Moreover, Plaintiffs do not challenge the seniority system but rather, want seniority in the system without working for it. It would indeed be quite disingenuous for Plaintiffs to now, after years in the system, a system which they worked to their benefit, assert the seniority system was enacted discriminatorily.[6]

The Tenth Circuit correctly decided this case on the *bona fide* seniority system basis. The circuit realized there was no need for any further findings or conclusions regarding other matters. (Apx. 8a, 11a). Even if the circuit could have somehow misapplied this properly stated rule, that, as noted above, does not provide a basis for a grant of a *writ*. See S.Ct. Rule 10(c); also *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498 (1951).

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[6] Any challenge to the seniority system at this late date would be time barred. See *Baraw v. New Orleans Steamship Ass'n*, 932 F.2d 473 (5th Cir. 1991); *Hamilton v. First Service Bank*, 928 F.2d 86 (4th Cir. 1990).

II. PLAINTIFFS FAIL TO ESTABLISH THAT THE COURT SHOULD REVIEW ANY RULING OF THE DISTRICT COURT

Plaintiffs attempt to overlook and ignore the well-founded decision of the appellate court and try to raise issues here decided by the district court.

Here, once again Plaintiffs miss the point. They attempt to treat a *writ* as simply another appeal arguing that this Court should review the granting of the summary judgment by the district court *de novo*. (Ptn. at 6) While that is the standard of review in the appellate court, this Court does not act as a second appellate court. See *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. at 502; *General Talk. Pictures Corp. v. Western Electric Corp.*, 304 U.S. 175, 178-179 (1937); Wright & Miller, 17 *Fed. Prac. & Proc.* § 9039 (1988) (discussion of the creation of the circuit courts and elimination of direct review); and, Act of June 27, 1988, Pub. L. 100-352 § 1. Plaintiffs assert that the district court erred in converting the Defendants' motion to dismiss to a motion for summary judgment and holding that Plaintiffs failed to establish a pretext. Other than to regurgitate the arguments made before the district and appellate courts, Plaintiffs, as with the *bona fide* system argument, present no reason of any compelling stature that any issue raised should be reviewed.

Plaintiffs here do not even assert how the Supreme Court would have any jurisdiction of these issues here. Clearly, the Court is not interested in these mundane, pedestrian issues. See S.Ct. Rule 10. The Court's preference is for compelling issues decided by appellate courts.

Lastly, Plaintiffs assert that the district court erred in holding that the "disparate impact" doctrine is inapplicable under the ADEA. Initially, Plaintiffs assert that the appellate court affirmed this holding. (Ptn. at i). It is quite clear that the appellate court did not reach that issue. Indeed, the court noted:

> Recognizing that the question is as yet undecided in this Circuit, see *Faulkner v. Super Valu Stores, Inc.*,

> 3 F.3d 1419, 1428 (10th Cir. 1993), *we expressly decline to resolve it today.* We instead affirm on more limited grounds the grant of summary judgment against the allegations of disparate impact.

Apx. 8a (emphasis added). The Tenth Circuit expressly refused to address the issue here and it remains undecided in that circuit.

Plaintiffs do later admit that the appellate court did not reach this issue, but nevertheless, assert that the Court should review it. Plaintiffs, however, fail to establish any ground for such review.

This Court has a definite preference for issues which appellate courts or state courts of highest resort have passed on. S.Ct. Rule 10; *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 558 (1981) (Court will not pass on issues not reached by appellate court); see also *Patrick v. Burget*, 486 U.S. 94, 94 n.5 (1988); 17 *Fed. Prac. & Proc.*, §§ 4004, 4036-40. On a rare occasion a *writ* may be granted while a case is pending before a circuit court and judgment has not been rendered. S.Ct. Rule 11; 28 U.S.C. § 2101(e). In order for such an extraordinary *writ* to be granted, a showing must be made that the case is of such "imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." S.Ct. Rule 11.

Rule 11 obviously does not apply here as the appellate court has already decided this case. Nor do Plaintiffs present any reason that this particular case is of imperative public importance which must be immediately decided. Again, their argument is a regurgitation of their arguments in the district and appellate courts.

Their apparent basis for a *writ* is that there is a confusion among the circuits. At this point, however, the Tenth Circuit is not confused as it has not decided the question. If this Court was, indeed, interested in resolving this question, this case, in its odd procedural stance with regard to this issue, would not be the case to grant a *writ*.

Here, the appellate court has refused to address the issue and the circuit remains undecided. Given the preference for appellate review, this case, presents only a district court's view. Moreover, given that the Plaintiffs are not really challenging their mandatory promotion or the *bona fideness* of the seniority system, but merely their placement according to the *bona fide* system, their claims do not present a compelling issue regarding disparate impact.

Given this, and the Plaintiff's inability to establish an ground for Supreme Court review of a district court opinion, as well as this Court's definite preference for appellate decisions, this is *not* the case to ignore standard practice and grant a *writ*.

CONCLUSION

For the foregoing reasons, Respondent United Transportation Union, respectfully requests that this Court deny Petitioners' request for a *writ of certiorari*.

Respectfully submitted,

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Date: January 10, 1996

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(4)

No. 95-912

Supreme Court, U.S.
FILED
JAN 29 1996

In The

Supreme Court of the United States

October Term, 1995

LEONARD HIATT, *et al.*,

Petitioners,

vs.

UNION PACIFIC RAILROAD COMPANY, a Utah Corporation; UNITED TRANSPORTATION UNION,

Respondents.

JEROME SMITH, *et al.*,

Petitioners,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware Corporation; UNITED TRANSPORTATION UNION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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STATEMENT OF THE CASE

Petitioners hereby incorporate by reference their statement of the case in their original petition for review. (Petition for Writ of Certiorari, at 2-4).

FURTHER REASONS FOR GRANTING THE WRIT

I.

PETITIONERS HAVE ESTABLISHED A PROPER BASIS FOR REVIEW.

Both Respondents erroneously assert that there are no special and important reasons for granting Petitioners' writ of certiorari. (Union Pacific's [hereinafter UP] Brief in Opposition, at 8-10; United Transportation Union's [hereinafter UTU] Brief in Opposition, at 4-6).[1] In federal cases, the granting of a writ of certiorari is appropriate in instances where there is a split in the decisions of the circuit courts, where the circuit court has decided an issue in such a manner as to warrant this Court's exercise of its supervisory power, or where the circuit court has decided an issue upon which this Court should exercise its supervisory power. S. Ct. Rule 10(1)(a) and (c). These are not the only reasons for which this Court will grant a writ of certiorari, however; instead, they only "indicate the character of the reasons that will be considered." S. Ct. Rule 10(1). In any event, all of these grounds have been met in the instant case.

A. Respondents Altered the Seniority System So That It Was No Longer Bona Fide.

In this case, the Tenth Circuit held that the granting of

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1. Respondent Burlington Northern filed no statement of its position, but merely its counsel's entry of appearance.

summary judgment was appropriate because the Respondents were acting pursuant to a bona fide seniority system, and erroneously concluded that Petitioners were demanding to change this bona fide seniority system. (App. A, at 9a). Not surprisingly, this also is the argument of both respondents. (UTU Brief in Opposition, at 10; UP Brief in Opposition, at 4-5).

Union Pacific recognized that the seniority system was already changed. (UP Brief in Opposition, at 5). However, Union Pacific mischaracterizes the reason for the change by asserting that such change was required by Public Law 102-29. (*Id.*). In fact, Public Law 102-29 neither changed the seniority system nor required the seniority system to be changed. The seniority system was changed when the Respondents implemented Public Law 102-29 by eliminating the brakemen position, without eliminating the work of the brakemen, as required, but robbed the brakemen of their seniority which they had worked years to build when that was not required by Congress.

Here there is an important federal issue that needs to be decided. That issue is whether the Respondents can discriminate, on the basis of age, by hiding behind a law that neither requires nor sanctions the Respondents' discriminatory action. Since the law did not require stripping Petitioners of their seniority, it is wrong to allow Respondents' free rein to discriminate by hiding behind Public Law 102-29.

B. The Tenth Circuit Inappropriately Refused to Consider Petitioners' Unrebutted Evidence of Intentional Discrimination in Light of the Lack of Discovery.

The Tenth Circuit agreed with the district court that Petitioners "failed to offer any evidence that would permit a rational trier of fact to conclude that the Respondents' actions were a pretext for intentional and unlawful discrimination on the

basis of age." (App. A, at 11a; App. B, at 40a-41a). In fact, Petitioners presented substantial *unrebutted* evidence of intentional discrimination. (App. E, 129a, ¶ 5; 131a, ¶¶ 8-10; 400a-02a, ¶¶ 7-11; *see also,* 135a-396a, ¶¶ 8-9). Additionally, despite Union Pacific's statement that there is no disparate impact challenge to a bona fide seniority system, a disparate impact has long been viewed as relevant evidence pointing to intentional discrimination. *Cf,* UP Brief in Opposition, at 10; *Pullman-Standard v. Swint,* 456 U.S. 273, 289 (1982); *Harvey by Blankenbaker v. United Transp. Union,* 878 F.2d 1235, 1244 (10th Cir. 1989). Petitioners produced such evidence of discriminatory impact. (App. C, at 61(a); App. D, at 89(a)). Had discovery been allowed, Petitioners assert that the impact would have been even greater because the proper pool would have been to consider only those brakemen who had not previously accepted promotion to conductor. (App. E, at 130a, ¶ 6; 400a, ¶ 6).

C. A Significant Split in the Circuits Exist as to Whether the Disparate Impact Doctrine Is Applicable to Cases Arising Under the ADEA, Thus Granting Petitioners' Writ of Certiorari Is Appropriate.

The issue of whether the disparate impact doctrine applies in seniority challenges under Title VII has long been settled in the negative. *See Pullman-Standard v. Swint,* 456 U.S. 273 (1982); *American Tobacco Co. v. Patterson,* 456 U.S. 63 (1982); *International Bhd. of Teamsters v. United States,* 431 U.S. 324 (1977). However, this Court has never decided the issue with respect to cases arising under the ADEA. (*See* App. A, at 8a). Significantly, the district court granted summary judgment, in part, upon the determination that the disparate impact doctrine is always inapplicable to cases arising under the ADEA. (App. B, at 43a - 58a). Thus, with this in mind, it is clearly appropriate for this Court to decide such an important issue.

This is especially so, given the fact that there is a considerable split among the circuits on this issue. *Compare MacPherson v. University of Montevallo*, 922 F.2d 766 (11th Cir. 1991); *Lyon v. Ohio Educ. Ass'n & Professional Staff*, 53 F.3d 135, 139-40 n. 5 (6th Cir. 1995); *Abbott v. Federal Forge, Inc.*, 912 F.2d 867 (6th Cir. 1990); *Holt v. Gamewell Corp.*, 797 F.2d 36,37 (1st Cir. 1986); *EEOC v. Borden's Inc.*, 724 F.2d 1390, 1394 (9th Cir. 1984); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686 (8th Cir. 1983); *Geller v. Markham*, 635 F.2d 1027 (2nd Cir. 1980), *with EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073 (7th Cir. 1994); *DiBiase v. Smithkline Beecham Corp.*, 48 F.3d 719, 732-34 (3d Cir. 1995) (arguing that disparate impact theory is not applicable to ADEA cases, but did not actually decide the issue). Such a split in the circuit clearly warrants the attention of this Court so that the ADEA may be applied in a uniform manner throughout this nation. *See* S. Ct. Rule 10.

United Transportation Union argues that review of this issue is inappropriate since the Tenth Circuit declined to decide this issue. (UTU Brief in Opposition, at 12). This argument ignores the fact that the Tenth Circuit's opinion was a final judgment in this case, and that this Court has discretion to decide issues raised before the appellate court but not decided. *See Patrick v. Burget*, 486 U.S. 94, 95 n.5 (1988); 17 Fed. Prac. & Proc. § 4036. Thus, this Court's review of this important issue is clearly appropriate.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request the Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit in this matter, since the court below, as well as the United States District Court for the District of Colorado made plain error in granting summary judgment in these actions without providing Petitioners the discovery they requested at the IPC and reiterated at oral argument on summary judgment, as noted by Petitioners in their petition for writ of certiorari. (Petition for Writ of Certiorari, at 7-9).

Respectfully submitted,

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